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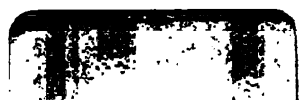
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THE
REVISED REPORTS

BEING
A REPUBLICATION OF SUCH CASES
IN THE
ENGLISH COURTS OF COMMON LAW AND EQUITY,
FROM THE YEAR 1785,
AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY
SIR FREDERICK POLLOCK, BART., LL.D.,
CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

ASSISTED BY
R. CAMPBELL, AND O. A. SAUNDERS,
OF LINCOLN'S INN, ESQ. OF THE INNER TEMPLE, ESQ.
BARRISTERS-AT-LAW.

VOL. II.

1790—1794.

2 COX—1-2 VESEY Jr.—4-8 T. R.—1 H. Bl.

LONDON:
SWEET AND MAXWELL, LIMITED, 3, CHANCERY LANE,

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LITTLE, BROWN & CO.

1891.

chargeable with superfluous caution rather than omit anything which may be fairly judged of practical utility. The first case in this volume happens to be a rather curious example of the sort of decisions on points not yet finally settled which, however much one may think they would not now be followed, it would not be safe to pass over. There are other cases again, such as *Goodright v. Rigby*, p. 564, or *Roe v. Baldwere*, p. 550, which look obsolete at first sight to a generation brought up under the Conveyancing Acts, but on which the validity of many titles may still depend. Now and then short explanatory notes have been added to show why a case is retained.

In this volume there will be found a certain number of cases of 1788-90, and one as early as 1745, from the second volume of Cox. An exact reduction of the old reporters to the chronological order to which they often paid scant regard would not, it is conceived, have been worth the trouble and delay that it would have entailed.

F. P.

JUDGES

OF THE

HIGH COURT OF CHANCERY.

1788—1794.

LORD THURLOW, 1778—1792	} <i>Lord Chancellors.</i>
LORD LOUGHBOROUGH, 1793—1801	
SIR LLOYD KENYON, 1784—1788	} <i>Masters of the Rolls.</i>
SIR RICHARD PEPPER ARDEN, 1788—1801 . .	
LORD LOUGHBOROUGH, Ch. J., C. P. . . .	} <i>Lords Commissioners.</i>
SIR JAMES EYRE, Ch. B. Ex.	
SIR WILLIAM HENRY ASHHURST, J., K. B. . .	
SIR JOHN WILSON, J., C. P.	
SIR BEAUMONT HOTHAM, B. Ex.	

COURT OF KING'S BENCH.

EARL OF MANSFIELD, 1760—1788	} <i>Chief Justices.</i>
LORD KENYON, 1788—1802	
SIR FRANCIS BULLER	} <i>Judges.</i>
SIR W. H. ASHHURST	
SIR NASH GROSE	
SIR SOULDEN LAWRENCE	

COURT OF COMMON PLEAS.

LORD LOUGHBOROUGH, 1780—1798	} <i>Chief Justices.</i>
SIR JAMES EYRE, 1798—1799	
JOHN HEATH*	} <i>Judges.</i>
SIR JOHN WILSON	
SIR GILES ROOKE	
SIR S. LAWRENCE	
SIR FRANCIS BULLER	

* Refused to be knighted.

COURT OF EXCHEQUER.

SIR JAMES EYRE, 1787—1798	} <i>Chief Barons.</i>
SIR ARCHIBALD MACDONALD, 1798—1818 . .	
SIR ALEXANDER THOMSON	} <i>Barons.</i>
SIR RICHARD PERRYIN	
SIR BEAUMONT HOTHAM	
SIR RICHARD PEPPER ARDEN, 1784—1788 . .	} <i>Attorneys-General.</i>
SIR ARCHIBALD MACDONALD, 1788—1798 . .	
SIR JOHN SCOTT, 1798—1799	
SIR ARCHIBALD MACDONALD, 1784—1788 . .	} <i>Solicitors-General.</i>
SIR JOHN SCOTT, 1788—1798	
SIR JOHN MITFORD, 1798—1799	

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TABLE OF CASES

REPRINTED FROM

2 COX; 1 & 2 VESEY, JR.; 4 & 5 T. R.; 1 H. BL.

In the Revised Reports DURNFORD AND EAST'S REPORTS are referred to by the usual abbreviation T. R. (Term Reports).

	PAGE
ABEL <i>v.</i> Heathcote, 2 Ves. Jr. 98	171
Agace, <i>Ex parte</i> , 2 Cox, 312	49
Alchin <i>v.</i> Wells, 5 T. R. 470	641
Anderson <i>v.</i> Hayman, 1 H. Bl. 120	734
— <i>v.</i> Maltby, 2 Ves. Jr. 244	206
Arthington <i>v.</i> Bishop of Chester, 1 H. Bl. 418	802
Atherton <i>v.</i> Pye, 4 T. R. 710	509
Atkinson <i>v.</i> Baker, 4 T. R. 229	366
Att.-General <i>v.</i> Boulton, 2 Ves. Jr. 380	265
Auriol <i>v.</i> Mills, 4 T. R. 94	341
BALL <i>v.</i> Montgomery, 2 Ves. Jr. 191	197
— <i>v.</i> Dunsterville, 4 T. R. 313	394
Barker <i>v.</i> Bishop of London, 1 H. Bl. 412	799
Barnes <i>v.</i> Crowe, 1 Ves. Jr. 486	154
Barr <i>v.</i> Carter, 2 Cox, 429	98
Barry <i>v.</i> Bebbington, 4 T. R. 514	450
Barwick <i>v.</i> Reade, 1 H. Bl. 627	808
Beachcroft <i>v.</i> Broome, 4 T. R. 441	427
Beavan <i>v.</i> Delahay, 1 H. Bl. 5	696
Bennett <i>v.</i> Mellor, 5 T. R. 273	593
Bentley, <i>Ex parte</i> , 2 Cox, 218	36
Bent <i>v.</i> Puller, 5 T. R. 494	654
Berryman <i>v.</i> Wise, 4 T. R. 366	413
Binford <i>v.</i> Bawden, 1 Ves. Jr. 511	162
Blandford (Doe <i>d.</i>) <i>v.</i> Applin, 4 T. R. 82	337
— <i>v.</i> Thackerell, 2 Ves. Jr. 238	202
Boone <i>v.</i> Eyre, 1 H. Bl. 273 <i>n.</i>	768
Boyle <i>v.</i> Peterborough (Bishop of), 1 Ves. Jr. 299	108
Bradshaw <i>v.</i> Lawson, 4 T. R. 443	429
Braithwaite <i>v.</i> Cooksey, 1 H. Bl. 465	807
Bristow <i>v.</i> Warde, 2 Ves. Jr. 336	235

	PAGE
Bromfield, <i>Ex parte</i> , 1 Ves. Jr. 453	126
Brough v. Whitmore, 4 T. R. 206	361
Bulteel, <i>Ex parte</i> , 2 Cox, 243	39
Burkitt (Doe <i>d.</i>) v. Chapman, 1 H. Bl. 223	755
Burt v. Moore, 5 T. R. 329	611
Burton (Goodright <i>d.</i>) v. Rigby, 5 T. R. 177	564
Butricke v. Broadhurst, 1 Ves. Jr. 171	100
CARLOS v. Fancourt, 5 T. R. 482	647
Cheetham v. Hampson, 4 T. R. 318	397
Chinnery v. Blackburn, 1 H. Bl. 117	731
Chorley v. Bolcote, 4 T. R. 317	395
Clarke v. Copley, 2 Cox, 173	25
Clennell v. Lewthwaite, 2 Ves. Jr. 465, 644	285
Clugas v. Penaluna, 4 T. R. 466	442
Cobden v. Kendrick, 4 T. R. 431	424
Compton v. Collinson, 1 H. Bl. 334	786
Cooke v. Loxley, 5 T. R. 4	521
Coope v. Eyre, 1 H. Bl. 37	706
Cooper (Doe <i>d.</i>) v. Collis, 4 T. R. 294	388
Coryton v. Helyar, 2 Cox, 340	75
Creuze v. Hunter, 2 Cox, 242	38
Crossling v. Crossling, 2 Cox, 396	88
DAVIES (Doe <i>d.</i>) v. Williams, 1 H. Bl. 25	703
Davis v. Bowsher, 5 T. R. 488	650
—, <i>Ex parte</i> , 5 T. R. 715	690
— v. Mason, 5 T. R. 118	562
Day v. Newman, 2 Cox, 77	1
Denn <i>d.</i> Webb v. Puckey, 5 T. R. 299	601
— <i>d.</i> Slater v. Slater, 5 T. R. 335	616
Doe <i>d.</i> Blandford v. Applin, 4 T. R. 82	337
— <i>d.</i> Burkitt v. Chapman, 1 H. Bl. 223	755
— <i>d.</i> Cooper v. Collis, 4 T. R. 294	388
— <i>d.</i> Davies v. Williams, 1 H. Bl. 25	703
— <i>d.</i> Duroure v. Jones, 4 T. R. 300	390
— <i>d.</i> Heneage v. Heneage, 4 T. R. 13	311
— <i>d.</i> Lancashire v. Lancashire, 5 T. R. 49	535
— <i>d.</i> Phillips v. Aldridge, 4 T. R. 264	379
— <i>d.</i> Phipps v. Mulgrave (Lord), 5 T. R. 320	607
— <i>d.</i> Rigge v. Bell, 5 T. R. 471	642
— <i>d.</i> Tanner v. Dorvell, 5 T. R. 518	662
— <i>d.</i> Turner v. Kett, 4 T. R. 601	475
— <i>d.</i> Watts v. Wainwright, 5 T. R. 427	634
— <i>d.</i> Willis v. Martin, 4 T. R. 39	324
Doo v. Brabant, 4 T. R. 706	503
Doulson v. Matthews, 4 T. R. 603	448
Driver v. Hussey, 1 H. Bl. 269	767
Dungey v. Angove, 2 Ves. Jr. 304	217

TABLE OF CASES.

xi

	PAGE
Durore (<i>Doe d.</i>) <i>v.</i> Jones, 4 T. R. 300	390
Dyer <i>v.</i> Dyer, 2 Cox, 92	14
ECARD <i>v.</i> Brooke, 2 Cox, 213	31
England <i>v.</i> Slade, 4 T. R. 682	498
Everest <i>v.</i> Gell, 1 Ves. Jr. 286	107
FARR <i>v.</i> Newman, 4 T. R. 621	479
Fielder <i>v.</i> Starkin, 1 H. Bl. 17	700
Firth <i>v.</i> Purvis, 5 T. R. 432	637
Folliott <i>v.</i> Ogden, 1 H. Bl. 134	736
Fox, <i>Ex parte</i> , 5 T. R. 276	596
— <i>v.</i> Mackreth, 2 Cox, 320; 2 Br. Ch. 400	55
Fuller <i>v.</i> Prentice, 1 H. Bl. 49	715
GALE <i>v.</i> Walsh, 5 T. R. 239	580
Gallini <i>v.</i> Laborie, 5 T. R. 242	581
Garforth <i>v.</i> Fearon, 1 H. Bl. 327	778
Garrick <i>v.</i> Earl Camden, 2 Cox, 231	37
Garside <i>v.</i> The Trent Navigation, 4 T. R. 581	468
Goodright <i>d.</i> Burton <i>v.</i> Rigby, 5 T. R. 177	564
— <i>d.</i> Tompson <i>v.</i> Saul, 4 T. R. 356	409
Gorton <i>v.</i> Falkner, 4 T. R. 565	463
Griffith <i>v.</i> Matthews, 5 T. R. 296	598
Grimstead <i>v.</i> Marlowe, 4 T. R. 717	512
Gunnis <i>v.</i> Erhart, 1 H. Bl. 289	769
HALL <i>v.</i> Lawrence, 4 T. R. 589	470
Hardacre <i>v.</i> Nash, 5 T. R. 716	691
Harrison <i>v.</i> Barnby, 5 T. R. 246	564
— <i>v.</i> Bulcock, 1 H. Bl. 68	718
Haynes <i>v.</i> Hare, 1 H. Bl. 659	810
Hays <i>v.</i> Bryant, 1 H. Bl. 253	763
Heneage (<i>Doe d.</i>) <i>v.</i> Heneage, 4 T. R. 13	311
Hobson <i>v.</i> Todd, 4 T. R. 71	335
Hollingworth <i>v.</i> Tooke, 2 H. Bl. 501	573
Houghton <i>v.</i> Butler, 4 T. R. 364	411
Howell <i>v.</i> Mac Ivers, 4 T. R. 690	500
Hunter <i>v.</i> Potts, 4 T. R. 182	353
Hutcheon <i>v.</i> Mannington, 1 Ves. Jr. 366	115
Hyde <i>v.</i> Trent and Mersey Navigation Co., 5 T. R. 389	620
IFIELD <i>v.</i> Weeks, 1 H. Bl. 222	754
Ireson <i>v.</i> Denn, 2 Cox, 425	97
Irving <i>v.</i> Wilson, 4 T. R. 485	444
JAMES (<i>Roe d.</i>) <i>v.</i> Avis, 4 T. R. 605	477
Jenkinson <i>v.</i> Thomas, 4 T. R. 665	493
Johnson <i>v.</i> Bann, 4 T. R. 1	309

	PAGE
Jones <i>v.</i> Jukes, 2 Ves. Jr. 518	308
— <i>v.</i> Marsh, 4 T. R. 464	441
Jordan (<i>Boe d.</i>) <i>v.</i> Ward, 1 H. Bl. 97	728
KENNARD <i>v.</i> Jones, 4 T. R. 495	447
Kidney <i>v.</i> Coussmaker, 1 Ves. Jr. 436	118
Kightley <i>v.</i> Kightley, 2 Ves. Jr. 328	224
LANCASHIRE (<i>Doe d.</i>) <i>v.</i> Lancashire, 5 T. R. 49	535
Langston <i>v.</i> Boylston, 2 Ves. Jr. 101	174
Law <i>v.</i> Rigby, 2 Cox, 415	92
Lawton <i>v.</i> Salmon, 1 H. Bl. 260	764
Leftley <i>v.</i> Mills, 4 T. R. 170	350
Legard <i>v.</i> Hodges, 1 Ves. Jr. 477	146
Lewis <i>v.</i> Freke, 2 Ves. Jr. 507	301
Lidderdale <i>v.</i> The Duke of Montrose, 4 T. R. 248	375
Lushington <i>v.</i> Waller, 1 H. Bl. 95	727
MALIM <i>v.</i> Keighley, 2 Ves. Jr. 333	229
Massey <i>v.</i> Davies, 2 Ves. Jr. 317	218
Master <i>v.</i> Miller, 4 T. R. 320 ; 2 H. Bl. 140 ; 1 Anst. 225	399
Mead <i>v.</i> Young, 4 T. R. 28	314
Mitchell <i>v.</i> Oldfield, 4 T. R. 123	342
— <i>v.</i> Tarbutt, 5 T. R. 649	684
— <i>v.</i> Walker, 5 T. R. 260	588
Moggridge <i>v.</i> Thackwell, 1 Ves. Jr. 464	140
Morewood <i>v.</i> Wood, 4 T. R. 157	349
Morgan <i>v.</i> Johnson, 1 H. Bl. 628	809
— <i>v.</i> Mather, 2 Ves. Jr. 15	163
Munt <i>v.</i> Stokes, 4 T. R. 561	459
NESBITT <i>v.</i> Lushington, 4 T. R. 783	519
Northumberland (<i>Duke of</i>) <i>v.</i> Errington, 5 T. R. 522	666
OGDEN <i>v.</i> Folliott, 3 T. R. 726 ; 4 Br. P. C. 111	736
O'Reilly <i>v.</i> Thompson, 2 Cox, 271	41
Orr <i>v.</i> Churchill, 1 H. Bl. 227	759
— <i>v.</i> Newton, 2 Cox, 274	44
Oxenden <i>v.</i> Compton (Lord), 2 Ves. Jr. 69	131
PARSONS <i>v.</i> Thompson, 1. H. Bl. 322	773
Pearson <i>v.</i> Henry, 5 T. R. 6	523
Perry <i>v.</i> Jackson, 4 T. R. 516	452
Phillips (<i>Doe d.</i>) <i>v.</i> Aldridge, 4 T. R. 264	379
— <i>v.</i> Hunter, 2 H. Bl. 403	353
Phipps (<i>Doe d.</i>) <i>v.</i> Mulgrave (Lord), 5 T. R. 320	607
Pigot <i>v.</i> Bullock, 1 Ves. Jr. 478	148
Pitt <i>v.</i> Mackreth, 2 Cox, 320 ; 2 Br. Ch. 400	55

TABLE OF CASES.

xiii

	PAGE
Powley v. Walker, 5 T. R. 373	619
Præd v. Gardiner, 2 Cox, 86	8
RAVEE v. Farmer, 4 T. R. 146	347
Reed v. Devaynes, 2 Cox, 285	48
Rax v. Boughey, 4 T. R. 281	381
— v. Clifton (Inhabitants of), 5 T. R. 498	657
— v. Croydon (Churchwardens of), 5 T. R. 713	688
— v. Davies, 5 T. R. 626	683
— v. Edwards, 4 T. R. 440	427
— v. Ely (Bishop of), 5 T. R. 475	644
— v. Essex (Inhabitants of), 4 T. R. 591	470
— v. Harris, 4 T. R. 202	358
— v. Holland, 4 T. R. 457	439
— v. Hollond, 5 T. R. 607	678
— v. Horsley, 5 T. R. 362	619
— v. Hube, 5 T. R. 542	669
— v. Jolliffe, 4 T. R. 285	383
— v. Newcomb, 4 T. R. 368	414
— v. Page, 4 T. R. 543	454
— v. Parrot, 5 T. R. 593	672
— v. Sainsbury, 4 T. R. 451	433
— v. Shepherd, 4 T. R. 381	416
— v. Soper, 5 T. R. 278	597
— v. St. Catherine's Hall (Master and Fellows of), 4 T. R. 233	369
— v. Topham, 4 T. R. 126	343
— v. Whitwell, 5 T. R. 85	545
— v. Winton, 5 T. R. 89	546
— v. York (Mayor of), 4 T. R. 699	501
— v. Younger, 5 T. R. 449	638
Rigby v. Macnamara, 2 Cox, 415	92
Rigge (Doe d.) v. Bell, 5 T. R. 471	642
Ringrose v. Bramham, 2 Cox, 384	84
Roe d: Crow v. Baldwere, 5 T. R. 104	550
— d. James v. Avis, 4 T. R. 605	477
— d. Jordan v. Ward, 1 H. Bl. 97	728
Rorke v. Dayrell, 4 T. R. 402	417
Ross v. Hunter, 4 T. R. 33	319
Routledge v. Dorril, 2 Ves. Jr. 357	250
SALTE v. Field, 5 T. R. 211	568
Sandford v. Remington, 2 Ves. Jr. 189	195
Saunderson v. Marr, 1 H. Bl. 75	723
Scholes v. Hargreaves, 5 T. R. 46	532
Shiells v. Blackburne, 1 H. Bl. 158	750
Shrewsbury (Countess of) v. Shrewsbury (Earl of), 1 Ves. Jr. 227	101
Sill v. Worswick, 1 H. Bl. 665	816
Slater (Denn d.) v. Slater, 5 T. R. 335	616

	PAGE
Smith <i>v.</i> Dudley, 4 T. R. 691	500
— <i>v.</i> Field, 5 T. R. 402	630
— <i>v.</i> Woodcock, 4 T. R. 691	500
Stanley <i>v.</i> Potter, 2 Cox, 180	26
Steel <i>v.</i> Houghton, 1 H. Bl. 51	715
Stratton <i>v.</i> Best, 1 Ves. Jr. 285	106
Syeds <i>v.</i> Hay, 4 T. R. 260	377
 TANNER (Doe <i>d.</i>) <i>v.</i> Dorvell, 5 T. R. 518	 662
Tate, <i>Ex parte</i> , 2 Cox, 312	49
— <i>v.</i> Hilbert, 2 Ves. Jr. 111	175
Taylor <i>v.</i> Stibbert, 2 Ves. Jr. 437	278
Thomas <i>v.</i> Powell, 2 Cox, 394	86
Thompson <i>v.</i> Symonds, 5 T. R. 41	526
Thornton <i>v.</i> Tracy, 2 Ves. Jr. 465, 644	285
Tompson (Goodright <i>d.</i>) <i>v.</i> Saul, 4 T. R. 356	409
Tooke <i>v.</i> Hollingworth, 5 T. R. 215	573
Toplis <i>v.</i> Baker, 2 Cox, 118	21
Tripp <i>v.</i> Frank, 4 T. R. 666	495
Turner (Doe <i>d.</i>) <i>v.</i> Kett, 4 T. R. 601	475
 VINEY <i>v.</i> Francis, 2 Cox, 190	 29
 WALKER <i>v.</i> Denne, 2 Ves. Jr. 170	 185
Wallop <i>v.</i> Warburton, 2 Cox, 409	89
Watts (Doe <i>d.</i>) <i>v.</i> Wainwright, 5 T. R. 427	634
Waymell <i>v.</i> Reed, 5 T. R. 599	675
Webb (Denn <i>d.</i>) <i>v.</i> Puckey, 5 T. R. 299	601
Wellington <i>v.</i> Arters, 5 T. R. 64	544
Whistler <i>v.</i> Webster, 2 Ves. Jr. 367	260
Wicks <i>v.</i> Fentham, 4 T. R. 247	374
Wilkins <i>v.</i> Despard, 5 T. R. 112	559
Williams <i>v.</i> Coussmaker, 1 Ves. Jr. 436	118
— <i>v.</i> Millington, 1 H. Bl. 81	724
— <i>v.</i> Pritchard, 4 T. R. 2	310
Willis (Doe <i>d.</i>) <i>v.</i> Martin, 4 T. R. 39	324
Wilson <i>v.</i> Piggott, 2 Ves. Jr. 351	246
— <i>v.</i> Rastall, 4 T. R. 753	515
 YEA <i>v.</i> Lethbridge, 4 T. R. 433	 425
 ZOUCH <i>v.</i> Willingale, 1 H. Bl. 311	 770

NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.

The Revised Reports.

VOL. II.

CHANCERY.

DAY *v.* NEWMAN.*

ET *RE* CONTRA.

(2 Cox, 77—83.)

1788.

Nov. 11, 13,
17, & 18.

Rolls Court.
ARDEN, M.R.
[77]

Where a written agreement is entered into for the purchase of an estate at a price far beyond its value, but without any circumstances of fraud or surprise, the Court will not decree a specific performance of such a contract, but on the other hand will not rescind it.

THE original bill was brought to compel a specific performance of an agreement for the purchase of an estate upon the terms after mentioned, which was resisted on account of the enormous price at which it had been sold, but the defendant entered into no evidence in support of his case in the original cause. On the same ground the cross bill prayed that the written contract for the purchase of the estate might be delivered up, and in that cause there was a considerable deal of evidence in support of the

* NOTE.—See *contra* *Collier v. Brown*, 1 R. R. 70, where it was held that mere inadequacy of price not amounting to evidence of fraud was not available as a sufficient defence to a purchaser's action for specific performance. There is a strong preponderance of authority in favour of the view thus taken in *Collier v. Brown*; but the case of *Day v. New-*

man has not been expressly overruled, and it is retained in case any distinction may possibly be suggested between the defence of excess of price as here raised by a purchaser to a vendor's action for specific performance, and the defence of inadequacy of consideration as raised by a vendor in the cases which followed *Collier v. Brown*.—O. A. S.

1788. plaintiff's case. After a very long hearing, his Honour gave judgment.

DAY

v.

NEWMAN.

MASTER OF THE ROLLS :

The facts on which the two bills now before the Court are founded, seem to be these. On 6th Jan. 1783, the contract in question was entered into, by which the defendant Newman agreed to purchase of the plaintiff Day the estate which he had to dispose of; the defendant Newman being then of the age of 24, and, as I am to understand, entitled to some considerable estate expectant on the death of an uncle; whether in fee, or in tail, does not appear on these proceedings. The terms of the contract were, that in consideration of one guinea paid down, and the residue of 6000*l.* to be paid immediately, and of 14,000*l.* more to be paid at the death of this uncle, the defendant was to have a conveyance of this estate perfected to him at Lady-day then next. All that is necessary to observe on the agreement at present is, that it was settled that the conveyances should be prepared at the expense of the defendant, but by the plaintiff's attorney. Lady-day elapsed, and no proceedings were had that were in any wise material, and in the month of May, 1783, the plaintiff, with his attorney, tenders to the defendant conveyances of the estate, with an abstract of his title. On the 14th of the same month the original bill was filed. No answer was put in to that bill until November, 1784; and on the 20th of June, *1786, the original cause was set down to be heard. At the hearing the defendant made default, but on account of some defect in the affidavit of service, no decree was then made. On the 14th Nov. 1786, the same cause was set down again on a more complete affidavit of service, and the defendant not appearing, a decree *nisi* was made. On the 23rd October, 1786, (which was before the decree *nisi*) the cross bill was filed to set aside the agreement. Now how it happened that the defendant to the original bill did not appear in Nov. 1786, when he had filed the cross bill the month before, I do not comprehend; however, so it was. On the 21st day of May, 1787, the order was made that service of the decree *nisi* on the defendant's clerk in Court should be deemed good service. And on the 14th June, 1788, the defendant

[*78]

Newman obtained an order that on payment of costs the original cause should be set down again to be heard, and that the cross cause should come on at the same time.

1788.
DAY
v.
NEWMAN.

If the first cause had stood by itself, there would have been no doubt but that the plaintiff would have been entitled to a decree, the defendant having made no case against him; but in the second cause many witnesses have been examined; and, as by the order of my predecessor, both causes are directed to come on together, I must consider them as one cause: and if I can see evidence in the second cause sufficient to prevent my giving relief in the first, I am to consider it as a defence made to the first bill; although it certainly would have been better and more regular if it had been so shaped; and on these two causes together the transaction appears to have been this. In the end of the year 1782 the estate had been advertised: the defendant had then a father alive: whether for himself or his son is not very clear, but, however, the father applied to the plaintiff to treat for the purchase of this estate: he took a survey of the premises, and on conversation with the plaintiff upon the subject, he was informed by the plaintiff that the price was 10,000*l.* but after some further conversation the plaintiff agreed to take 9000*l.* for it. This the father thought too much, and the treaty ended. The *father and the son again applied to the plaintiff upon the same subject some short time afterwards. The son was left by the father at the house of the plaintiff for some days, and during that time he came to an agreement with the plaintiff for the purchase of this estate, and a Mr. Chatter, an attorney, was called in to prepare the agreement in writing, who, after two or three days, brought a written contract with him, and after having been read over to them, it was signed by both parties. The contract was that on payment of the 6000*l.* down and the 14,000*l.* on the death of the uncle, the plaintiff would make to the defendant a good title to the premises. In February, about six weeks afterwards, the defendant repented of his bargain, and went in company with a Mr. Payne to desire he might be let off his bargain. He wished the estate to be resold, and he offered to make good the loss that might be sustained. Nothing, however, was done; but on tendering the conveyances,

[*79]

1788.

DAY

v.

NEWMAN.

as I have before mentioned, the defendant refused to execute them. On the first cause nothing appears but the agreement itself, and the evidence of Mr. Chatter. On that, therefore, I must have decreed a specific performance; but, on the cross bill the first ground of defence is, that the seller represented to the buyer that a Mr. Lutteridge, who had a contiguous estate, was ready to convey that estate to the buyer on certain terms, whereas, on application, Mr. Lutteridge refused so to do. Now of this fact, *i.e.* of such representation having been made, there is no evidence, (although it is in proof that Mr. Lutteridge would not accede to those terms). That therefore I must not at present believe. The next ground is, that the consideration was grossly inadequate; and not only this but that it was so in the opinion of Day himself; for that, according to his own computation, the estate was worth no more than 9000*l.* instead of which he bargained to sell it for 20,000*l.* payable as I have before mentioned. This is the kind of contract which Mr. Day on the one hand says ought to be carried into execution by this Court, and Mr. Newman on the other hand says, ought to be given up. On the whole of the evidence I must take it that the estate was *not worth more than 10,000*l.* at the outside. The value is put in issue by the cross cause particularly, and the defendant to the cross bill has not thought fit to read one line of evidence upon this point, although I understand he has examined several witnesses; but as he has not read them, I shall take it that there is no proof on his part in the cause as far as relates to the value. It stands then thus; that an estate worth 10,000*l.* is sold for 6,000*l.* down, and 14,000*l.* more payable at the death of a man aged 64 or 65. Is then this such an inadequacy of price as will induce the Court to set aside the contract, or (at least) not to enforce it? These are the two questions. The inadequacy of price is certainly great, but I am not prepared to say that it is sufficient to induce the Court to make the party deliver up the contract; but I am satisfied it is a sufficient reason to induce the Court not to decree a specific performance. There is no evidence of facts out of the agreement. A young man thinks fit to make a bargain seemingly with his eyes open, and without any appearance of fraud practised. As to the authorities cited

[*80]

in support of the cross bill, they are very different from this case; this is not to set aside a conveyance that would bind the party absolutely to part with an estate; this is a contract for buying an estate; and what is asked of the Court is to prevent the seller from bringing any action on this agreement: the other cases are, where there has been a pressure of necessities, and an advantage has been taken of such necessitous men standing in immediate want of assistance. The case of *Nott v. Hill* has been particularly relied upon. That case was determined by Lord JEFFERIES, who, with all his faults as a politician, was a very good judge; but the case of *Nott v. Hill* had a very odd fate. As reported in 2 Cha. Ca. 120, it came on before Lord Nottingham, and the case was, that an expectant heir was entitled in tail to an estate worth 80*l.* or 40*l.* per annum, and in consideration of 30*l.* down, and 20*l.* per annum for the joint lives of himself and his father, made an absolute conveyance of the estate, so that he could have no defence at law. Lord NOTTINGHAM was of opinion that the Court ought to relieve. This cause came on again before Lord NORTH *in 1683 (1 Vern. 167), and he reversed Lord NOTTINGHAM's decree, saying that he did not conceive the Court could give relief against such a transaction. The same cause under the name of *Johnson v. Nott*, came on before Lord North on the 19th November, 1684, where the executor of Hill filed his bill against Nott, stating that some further acts were necessary to be done by Nott to make a good title to the estate, and praying that Nott might specifically perform his agreement. But Lord NORTH, though he thought there was not enough in the case to rescind the contract, was of opinion that this was too hard a bargain to be assisted in a Court of Equity, and dismissed the bill. The original cause came on again to be reheard before Lord JEFFERIES in 1687 (2 Vern. 27), and he reversed Lord NORTH's decree, and established Lord NOTTINGHAM's, setting aside the contract. The next case was that of *Berry v. Pitt*, before Lord Jefferies, 2 Vern. 14, and the ground of the bill in that case was the working on the necessity of the plaintiff. Lord NOTTINGHAM had refused to relieve, but on a rehearing, Lord JEFFERIES reversed that decree, and ordered all the money to be refunded beyond the original loan. There are a

1788.
DAY
v.
NEWMAN.

[*81]

1788.

DAY

v.

NEWMAN.

great many more cases on this head which are collected principally in *Gwyne v. Heaton*, 1 Bro. Cha. Rep. 1, and which adopt the principle that a bargain made under the pressure of necessity and attended with gross inadequacy shall be rescinded. I therefore certainly do not think of disturbing the doctrine to be found in *Gwyne v. Heaton*, and the several cases there mentioned: but this case is by no means analogous to them; here is no advantage taken of the circumstances of the party; here is no necessity suggested; a man of the age of twenty-four, not vesting money, but choosing to buy an estate, makes a foolish bargain. The only case I shall take much notice of is that of *Barnadiston v. Lingood*, 2 Atk. 183; that was the case of a cause and cross cause brought in the same manner as the present are. And Lord HARDWICKE there says, that in the case of a hard bargain that is not absolutely executed, but executory only, the constant rule of the Court is not to carry it into *execution; but in that case he thought fit to relieve by cancelling the contract, because it was a case in which distress had been taken advantage of and the mischief was done at law, for a judgment was given for 6,000*l*. It has been much pressed by the counsel for the plaintiff in the original cause, that I should consider the original cause distinctly from the cross cause, especially under the circumstances under which the cross cause has been instituted; but his late Honour, by directing the two causes to come on to be heard together, has decided that the defendant in the original cause shall be at liberty to defend himself in that cause by means of the cross cause. I am therefore bound to look into that second cause; and there I find that a bargain was made for buying an estate at a very inadequate price; so enormous, that all mankind must at the first mention of it concur in thinking it so. If I had any doubt about the adequacy of the price, I would put it in some mode of inquiry; but as the case stands the value is 9,000*l*. And then the question is, whether a young man shall in this Court be holden to a bargain like this? Really on that question I cannot doubt (and indeed my great doubt is about the costs). I would rest on authorities if I could find them; but this is not like any of the cases cited; it has none of the ingredients which I have before taken notice of;

[*82]

but it is the bare case of two men *sui juris*, bargaining with their eyes open: no pressure of circumstances whatever. In this point of view I shall mention the case of *Underwood v. Hithcox*, 1 Ves. sen. 279, which comes near to the present, and there Lord HARDWICKE said, it was too hard to make the defendant surrender the copyhold estate on so inadequate a consideration, and dismissed the bill without cost. In *Savage v. Taylor*, Forr. 234, the distinction is made expressly between the cases where the Court will refuse to execute a contract on account of the hardness of the bargain, and those where the Court will rescind the contract; and on this point the case of *Griffiths v. Spratley*, in the Exchequer, has been mentioned from 2 Bro. Cha. Rep. (as a note to *Heathcote v. Paignion*), and I certainly agree that inadequacy of price in itself is not a sufficient *ground for setting aside a contract. *Herne v. Meers*, 1 Vern. 465, has been thought to contradict this; but *Herne v. Meers* had in it the ingredient of there being a great pressure of circumstances. In the present case I am ready to declare that, if the price had not been so grossly disproportionate to the real value of the estate, I should not have thought that the other circumstances relied upon by the defendant, could have prevented the Court from executing the contract; I mean that of the plaintiff's attorney being employed to prepare the agreement, and that of the title not being prepared at the time specified. If it had been anything like a fair contract, I must have decreed it (though certainly I cannot help thinking the Court has gone a great way in decreeing the execution of contracts, without respect to the time in which they were expressly agreed to be completed). I go on the terms of the bargain merely; I have looked through the cases, and agree with them; but very few of them apply to this: here is no fraud or necessity proved, and it is the case of executory articles. How then am I to dispose of these two bills? I think there are no grounds on which I can set the contract aside; for neither side have a right to complain of a bargain made so deliberately as this was. The party has no right to ask the Court to prevent the consequences of his own solemn act; but on the other hand, most certainly this is too hard a bargain for the Court to assist in. Therefore I shall dismiss both the bills.

1788.

DAY

v.
NEWMAN.

[*83]

1788.
DAY
r.
NEWMAN.

His Honour expressed considerable doubt as to the costs, and took time to consider of that matter until the next day, and then proposed to the plaintiff, that if he would give up his contract, the original bill should be dismissed without costs, and the cross bill with costs; but on the plaintiff's refusing to do this, his Honour dismissed both bills without costs.

1788.
Nov. 24.
THURLOW,
L.C.
[86]

PRAED v. GARDINER.

(2 Cox, 86—91.)

A. being indebted to B. lodges several securities for money with him, as collateral securities for that debt. A. afterwards borrows a further sum of money of B. for which C. becomes his surety. A. becomes bankrupt, and B. calls upon C. to pay the second debt. The securities in the hands of B. being more than sufficient to pay the first debt, C. shall have the benefit of the surplus in reduction of the second debt.

SAMUEL BLACKWELL and Samuel Peach, both merchants of London, having had various dealings together for a considerable length of time, Blackwell, in April, 1781, applied to Peach to lend him his acceptance to a bill to be drawn by Blackwell for 1,000*l.* payable eleven weeks after date, which Blackwell was to take up at the time it became due. Peach accordingly accepted the bill, and Blackwell gave him a promissory note for the sum of 1,000*l.* payable at the same time. Some time before the bill became due, Blackwell not being certain of having the money ready to take it up, gave Peach another promissory note for 1,000*l.* payable to Peach or order, a month after date, on which Peach was to raise money (if necessary) to take up the bill. However, Blackwell in fact had obtained the money before the bill became due, and actually paid the 1,000*l.* into Peach's Compting-House. The promissory notes of course ought to have been delivered up, instead of which Peach negotiated the first, and Blackwell was forced to pay it (but that made no part of the present suit). And soon after the second note given, Peach applied to Charles Boddam to lend him a sum of 1,400*l.* for which he gave his own promissory note, and as a collateral security he deposited with Boddam the second promissory note

of Blackwell, and also a promissory note of William Saxby for 400*l.* payable to Peach on order ; but Peach did not indorse either of them. Soon after this a commission of bankruptcy issued against Peach, and he was declared a bankrupt accordingly.

It appeared that at the time Peach borrowed the 1,400*l.* from Boddam, he was indebted to Boddam in the sum of 5,272*l.* 4*s.* 6*d.* on bond, on account of a former transaction ; and Boddam requiring some further security, Peach deposited in Boddam's hands, as a further security for that balance, two several assignments of annuities of 300*l.* and 100*l.* which had been made to Peach, a *respondentia* bond, a bill of a sale of part of a ship and other securities, which *it was agreed were worth considerably more than the debt owing to Boddam. These securities remained in his hands at the time Peach borrowed the 1,400*l.* and it was stated in the bill that Peach then expressly agreed that they should remain as a further security for the 1,400*l.* as well as for the former debt of 5,272*l.* 4*s.* 6*d.* ; but of this there was no proof in the cause, and it was therefore taken as making no part of this case.

After Peach's bankruptcy Boddam called on Blackwell for payment of the promissory note for 1,000*l.* and Blackwell then insisted that the securities in Boddam's hands were liable to both his demands on Peach, and were available to the extent of both of them, and that under these circumstances Boddam ought certainly to resort to them, before he called upon him in respect of the promissory note. The two notes of 1,000*l.* and 400*l.* not having been indorsed by Peach, Boddam petitioned the Lord Chancellor in the matter of Peach's bankruptcy, praying that Peach and his assignees might be ordered to indorse the same, in order to enable Boddam to bring actions at law thereon, he undertaking not to bring any action or suit in law or equity thereon, against Peach or his assignees. On 21st December, 1781, an order was made in the said petition on hearing counsel for Boddam and the assignees of Peach (the petition not having been served on Blackwell), that Boddam should be at liberty to prove his debt under Peach's commission, and adjourned the petition to the next day of petitions : and the petition coming on again to be heard on 6th February, 1782, the Lord CHANCELLOR

1788.
PRAED
v.
GARDINER.

[*87]

1788.
PRAED
 v.
 GARDINER.

ordered that Peach and his assignees should indorse the said two bills, that they might be put in suit against Saxby and Blackwell respectively, and it was ordered that the money which should arise and be recovered on the said notes, should be paid into the bank, in the name of the Accountant-General, to the credit of "the matter of Peach, a bankrupt," subject to the further order of his Lordship.

Upon this Boddam recovered the money made payable by the said note from Blackwell, which was in pursuance of the said order paid into the bank.

[*88]

*Blackwell commenced this suit in his lifetime, but he and Boddam having both died in the course of the prosecution of it, it was revived by H. M. Praed, the administrator, with the will annexed of Blackwell, against Samuel Gardiner and Mary his wife (the administratrix of Boddam), Samuel Peach and his assignees, and William Saxby and two persons to whom he had assigned his effects for the benefit of his creditors, and the bill prayed that the securities deposited by Peach with Boddam, in February, 1781, or such of them as should be necessary might be appropriated towards discharging the said 1,400*l.* and interest, and that Blackwell's promissory note for 1,000*l.* might be delivered up to be cancelled or his name taken therefrom, or in case the Court should be of opinion that Boddam was entitled to be paid what should be remaining due to him of the said sum of 1,400*l.* by and out of Blackwell's promissory note, then that an account might be taken of what remained due, to the representatives of Boddam, in respect of the said 1,400*l.* and that upon payment thereof by the plaintiff so far as the said promissory note for 1,000*l.* should extend, the said note might be delivered up to the plaintiff, and that Peach and his assignees and all other necessary parties might assign to the plaintiff the said several securities, so deposited by Peach in the hands of Boddam, or might empower the plaintiff to sue for, recover, and receive the monies due and to grow due thereon, for the benefit of the estate of Blackwell, and that the plaintiff might be entitled to the benefit of the said debt, proved by Boddam under Peach's commission and might receive all future dividends to be made of the said bankrupt's estate in respect of the said debt, and that

out of the monies which the plaintiff might receive by all or any of the means aforesaid, the plaintiff might be at liberty to retain not only the said sum of 1,000*l.* or so much thereof as plaintiff should be obliged to pay to Boddam's representatives upon the accounts aforesaid; but also such costs, charges, and expenses as Blackwell was put to in defending the said action brought by Boddam, or in the prosecution of this suit, or otherwise relating to the matters aforesaid, the plaintiff undertaking *to pay the residue of the monies which should be made from such securities as the Court should direct, and that in the meantime the representatives of Boddam might be restrained from all proceedings in the said action, or otherwise at law against the plaintiff.

1788.
PRAED
v.
GARDINER.

[*89]

Under these circumstances it was insisted on the part of the plaintiff, that although there was not in proof any express agreement on the part of Peach, that the securities in the hands of Boddam should remain in his hands, as a further security for the second debt of 1,400*l.* yet it was the clear equity of this Court that where two distinct pledges were made to the same person for two distinct debts, the pledgor could not insist on redeeming the one without redeeming the other; that in this case, Blackwell stood (at least) in the light of a surety to Boddam for Peach the principal debtor, and having paid the debt for the principal would be clearly entitled to stand in the place of the creditor as against the principal debtor, and have all the equity against him which the creditor had; and if so, against Peach, there must be the same equity against his assignees; as Boddam was therefore entitled in his lifetime to retain both the pledges for the security of this debt against the assignees of Peach, so Blackwell standing in his place, in consequence of his having paid the debt, would have the same right.

And after some argument on the part of Peach's assignees, the LORD CHANCELLOR was of opinion that the plaintiff was entitled to the relief he sought. And his Lordship referred it to the Master to take an account of what was due to the defendant Gardiner and Mary his wife, as administratrix of Charles Boddam, for principal and interest on the securities deposited with him by Peach and on Peach's promissory note for 1,400*l.*, and

1788.
 PRAED
 v.
 GARDINER.

[*90]

to tax the said Gardiner and his wife and Charles Boddam's costs, and directed that what should be found due for such principal, interest and costs, together with the costs of the judgment recovered by the said Charles Boddam against the said Samuel Blackwell should be paid out of the 1,005*l.* 1*s.* 5*d.* bank 3 per cent. annuities, standing in the name of the *Accountant General in trust in the cause,† and the dividends that had accrued or should accrue thereon until the time of the sale of the said annuities, and in order thereto that the 1,005*l.* 1*s.* 5*d.* bank annuities, should be sold with the privity of the Accountant General, and one of the cashiers of the bank was to have notice to receive the money to arise by the said sale, who upon receipt thereof was to pay the same into the bank to the credit of this cause the same account, and that the money so to be raised, and the dividends already accrued and to accrue on the said bank annuities until the sale thereof, should be paid to the said Charles Gardiner and Mary his wife in the right aforesaid, in or towards satisfaction of what should be due to them as aforesaid; and in case the same should not be sufficient for that purpose, that the 1,351*l.* 7*s.* 1*d.* three per cent. bank annuities, standing in the name of the said Accountant General in trust in the cause (the account of the late Samuel Blackwell's bill of 1,000*l.*) should be sold, &c., and thereupon that what should remain due to the said Samuel Gardiner and Mary his wife, as administratrix of Boddam, should be paid to them. And his Lordship declared that the residue of the money to arise by the sale of the said 1,351*l.* 7*s.* 1*d.* bank annuities, would belong to the plaintiff H. M. Praed, as the personal representative of Samuel Blackwell; and for the purposes aforesaid the Accountant General was to draw on the bank, according to the form prescribed by the Act of Parliament, for relief of the suitors of this Court and the general rules of this Court; and declared that the plaintiff was entitled to receive a satisfaction out of the securities deposited with the said Charles Boddam for so much of the said 1,351*l.* 7*s.* 1*d.* bank annuities, and the interest and dividends arising therefrom, as should be paid to Gardiner and his wife; and directed

† It does not appear by the register's book from what fund this sum of 1,005*l.* 1*s.* 5*d.* bank annuities arose.

that the Master should take an account of what the defendants, the assignees of Peach, or any of them, or any person or persons by their or any of their order or for their or any of their use, had received in respect of such *securities as aforesaid, and that they should pay what should be found due from them on such account to the plaintiff, and that such securities should be assigned to the plaintiff in trust thereout to retain what Gardiner and his wife should have received of the said 1,351*l.* 7*s.* 1*d.* bank annuities, and the dividends arising therefrom ; and that the Master should tax the costs of the late Samuel Blackwell incurred by him in defending the action, commenced against him by Charles Boddam, on his note for 1,000*l.*, and also the costs of Blackwell, and of the plaintiff his representative in this suit, and that the plaintiff should be at liberty to retain the amount of such costs out of the money to be received by him by means of the assignment aforesaid. And his Lordship also referred it to the Master to take an account of what the said Charles Boddam, or his representative, or either of them, or any person, by their or either of their order, or for their or either of their use, had received out of the estate of the defendant William Saxby in respect of his note for 400*l.* and to tax Saxby and the defendants the trustees of his estate their costs of this suit : and after payment and satisfaction to the plaintiff of the several sums of money and costs aforesaid, the plaintiff was to assign and transfer the securities which should then remain with him, to the defendant William Saxby and his trustees, in trust to receive thereout the amount of what the Master should certify to have been received by the said Charles Boddam, or his representatives, from the estate of the said William Saxby, in respect of the said note for 400*l.* and what should be found due to them for the costs of this suit, and subject thereto in trust for the said Samuel Peach, and the defendants his assignees. And his Lordship directed that Gardiner and his wife should deliver to the plaintiff, the said Samuel Blackwell's promissory note for 1,000*l.* and also deliver to William Saxby and his trustees the said note for 400*l.* And the parties were to be examined upon interrogatories, &c., and any of the parties were to be at liberty to apply to the Court as they should be advised.—Reg. Lib. B. 1788, fol. 385.

1788.
 PRÆD
 v.
 GARDINER.
 [*91]

1788.

Nov. 20, 21,
& 27.*Exchequer.*EYRE, L.C.B.
HOTHAM, B.
THOMPSON, B.

[92]

DYER v. DYER.

(2 Cox, 92—99.)

Advancement.

Copyhold granted to A. and B. his wife, and C. his younger son, to take in succession for their lives and the life of the survivors. The purchase money was all paid by A. C. is not a trustee of his life interest for A., but takes it beneficially as an advancement from his father.

In 1737 certain copyhold premises holden of the manor of Heytesbury, in the county of Wilts, were granted by the lord, according to the custom of that manor, to Simon Dyer (the plaintiff's father) and Mary his wife, and the defendant William (his other son) to take in succession for their lives, and to the longest liver of them. The purchase money was paid by Simon Dyer the father. He survived his wife and lived until 1785, and then died, having made his will, and thereby devised all his interest in these copyhold premises (amongst others) to the plaintiff, his younger son. The present bill stated these circumstances, and insisted that the whole purchase money being paid by the father, although, by the form of the grant, the wife and the defendant had the legal interest in the premises for their lives in succession, yet in a court of equity they were but trustees for the father, and the bill therefore prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

The defendant insisted that the insertion of his name in the grant operated as an advancement to him from his father to the extent of the legal interest thereby given to him. And this was the whole question in the cause.

This case was very fully argued by Mr. *Solicitor-General* and *Ainge* for the plaintiff, and by *Burton* and *Morris* for the defendant. The following cases were cited, and very particularly commented on: *Smith v. Baker*, 1 Atk. 385; *Taylor v. Taylor*, 1 Atk. 386; *Mumma v. Mumma*, 2 Vern. 19; *Howe v. Howe*, 1 Vern. 415; *Anon.* 2 Freem. 123; *Benger v. Drew*, 1 P. W. 781; *Dickinson v. Shaw*, before the Lords Commissioners in 1770; *Bedwell v. Froome* before Sir T. Sewell, on the 10th May, 1778; *Row v. Bowden*, before Sir L. Kenyon, sitting for the Lord Chan-

cellor ; *Crispe v. Pratt*, Cro. Car. 548 ; *Scroope v. Scroope*, 1 Cha. Ca. 27 ; *Elliot v. Elliot*, 2 Cha. Ca. 231 ; **Ebrand v. Dancer*, 2 Cha. Ca. 26 ; *Kingdome v. Bridges*, 2 Vern. 67 ; *Back v. Andrews*, 2 Vern. 120 ; *Rundle v. Rundle*, 2 Vern. 264 ; *Lamplugh v. Lamplugh*, 1 P. W. 111 ; *Stileman v. Ashdown*, 2 Atk. 430 ; *Pole v. Pole*, 1 Ves. sen. 76.

1788.
DYER
v.
DYER.
[*93]

EYRE, LORD CHIEF BARON (after directing the cause to stand over for a few days), delivered the judgment of the Court :

The question between the parties in this cause is, whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question, and whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause, and I then indeed entertained very little doubt upon the rule of a court of equity, as applied to this subject ; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them, in order that the ground of our decision may be put in as clear a light as possible, especially in a case in which so great a difference of opinion seems to have prevailed at the bar. And I have met with a case in addition to those cited, which is that of *Rumbold v. Rumbold* on the 20th April, 1761. The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold ; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser ; whether in one name or several ; whether jointly or *successivè*, results to the man who advances the purchase money. This is a general proposition supported by all the cases, and there is nothing to contradict it ; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by

1788.
 DYER
 v.
 DYER.
 [*94]

rebutting the resulting trust ; and it has been determined in so many cases that the *nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law ; surely then it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be of course evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides. In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shews the father intended an advancement, and therefore the resulting trust is rebutted ; but then a circumstance is added to this, namely, that the son happened to be provided for ; then the question is, did the father intend to advance a son already provided for ? Lord NOTTINGHAM could not get over this, and he ruled that in such a case the resulting trust was not rebutted ; and in *Pole v. Pole*, in Vesey sen. Lord HARDWICKE thought so too ; and yet the rule in a court of equity as recognised in other cases is, that the father is the only judge as to the question of a son's provision ; that distinction, therefore, of the son being provided for or not, is not very solidly taken or uniformly adhered to. It is then said that a purchase in the name of a son is a *prima facie* advancement, (and indeed it seems difficult to put it in any way) ; in some of the cases some circumstances have appeared which go pretty much against that presumption, as where the father has entered and kept possession, and taken the rents ; or where he has surrendered or devised the estate ; or where the son has given receipts in the name of the father ; the answer given is, *that the father took the rents as guardian of his son ;

[*95]

now would the Court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that the son being under age, he could not give receipts in any other manner: but I own this reasoning does not satisfy me. In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be that the first taker might surrender the whole lease, that shall make the other lessees trustees for him; but this custom operates on the legal estate, not on the equitable interest; and therefore this is not a very solid argument. When the lessees are to take *successivè*, it is said, that as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea; to be sure taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to him in succession, the inference is very different. These are the difficulties which occur from considering the purchase in the son's name as a circumstance of evidence only. Now if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matters of presumption would be avoided.

It must be admitted that the case of *Dickinson v. Shaw* *is a case very strong to support the present plaintiff's claim. That came on in Chancery on 22nd May, 1770. "A copyhold was

1788.

DYER

v.

DYER.

[*93]

1788.

DYER

v.

DYER.

granted to three lives to take in succession the father, son, and daughter; the father paid the fine; there was no custom stated; the question was whether the daughter and her husband were trustees during the life of the son, who survived the father. At the time of the purchase the son was nine, and the daughter seven years old. It appeared that the father had leased the premises from three years to three years to the extent of nine years. On this case Lords Commissioners SMYTHE and ASTON were of opinion, that as the father had paid the purchase-money, the children were trustees for him." To the note I have of this case, it is added that this determination was contrary to the general opinion of the bar, and also to a case of *Taylor v. Alston* in this Court. In *Dickinson v. Shaw* there was some little evidence to assist the idea of its being a trust, namely, that of the leases made by the father; if that made an ingredient in the determination, then that case is not quite in point to the present; but I rather think that the meaning of the Court was that the burthen of proof laid on the child; and that the cases which went the other way were only those in which the estate was entirely purchased in the name of the children; if so, they certainly were not quite correct in that idea, for there had been cases in which the estates had been taken in the names of the father and son. I have been favoured with a note of *Rumbold v. Rumbold* before Lord Keeper Henley on the 20th April, 1761, where a copyhold was taken for three lives in succession, the father and two sons; the father paid the fine; and the custom was that the first taker might dispose of the whole estate (and his Lordship then stated that case fully). Now this case does not amount to more than an opinion of Lord Keeper HENLEY; but he agreed with me in considering a child as a purchaser for good consideration of an estate bought by the father in his name, though a trust would result as against a stranger. It has been supposed that the case of *Taylor v. Alston* in this Court denied the authority of *Dickinson v. Shaw*. That *cause was heard before Lord Chief Baron Smythe, myself, and Mr. Baron BURLAND, and was the case of an uncle purchasing in the names of himself and a nephew and niece; it was decided in favour of the nephew and niece, not on any general idea of their taking as re-

lations, but on the result of much parol evidence, which was admitted on both sides, and the equity on the side of the nominees was thought to preponderate. Lord KENYON was in that cause, and his argument went solely on the weight of the parol evidence; indeed, as far as the circumstance of the custom of the first taker's right to surrender, it was a strong case in favour of a trust; however the Court determined the other way on the parol evidence: that case therefore is not material. Another case has been mentioned which is not in print, and which was thought to be materially applicable to this, *Bedwell v. Froome* before Sir T. Sewell; but that was materially distinguishable from the present; as far as the general doctrine went, it went against the opinion of the Lords Commissioners. His Honour there held that the copyholds were part of the testator's personal estate; for that was not a purchase in the name of the daughter; she was not to have the legal estate; it was only a contract to add the daughter's life in a new lease to be granted to the father himself; there could be no question about her being a trustee; for it was as a freehold in him for his daughter's life; but in the course of the argument his Honour stated the common principles as applied to the present case; and ended by saying that as between father and child the natural presumption was that a provision was meant. The anonymous case in 2 Freem. corresponds very much with the doctrine laid down by Sir T. SEWELL; and it observes that an advancement to a child is considered as done for valuable consideration, not only against the father, but against creditors. *Kingdome v. Bridges* is a strong case to this point, that is, the valuable nature of the consideration arising on a provision made for a wife or for a child; for there the question arose as against creditors.

I do not find that there are in print more than three cases *which respect copyholds, where the grant is to take *successivè*. *Rundle v. Rundle*, 2 Vern. 264, which was a case perfectly clear; *Benger v. Drew*, 1 P. W. 781, where the purchase was made partly with the wife's money; and *Smith v. Baker*, 1 Atk. 385, where the general doctrine as applied to strangers was recognized; but the case turned on the question, whether the interest was well devised. Therefore, as far as respects this particular

1788.

DYER
v.
DYER.

[*98]

1788.

DYER

v.
DYER.

case, *Dickinson v. Shaw* is the only case quite in point; and then the question is whether that case is to be abided by? With great reverence to the memory of those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time, or the opinion of learned men; and Lord KENYON has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation, namely, that the inference of a provision being intended did not arise because the purchase could not have been taken wholly in the name of the purchaser. This we think is not sufficient to turn the presumption against the child; if it is meant to be a trust, the purchaser must shew that intention by a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement, when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might perhaps occur in every case upon which it might be argued that an advancement was not intended. And I own it is not a very prudent conduct of a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family; but this applies equally in case of a purchase in the name of the child only; yet that case is admitted to be an advancement; indeed, if any thing, the latter case is rather the strongest, for there it must be confined to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout.

[*99]

*This bill must therefore be dismissed; but after stating that the only case in point on the subject, is against our present opinion, it certainly will be proper to dismiss it without costs.

TOPLIS *v.* BAKER.

(2 Cox, 118—124.)

J. T. bequeathed in these words, "I give to N. D. the sum of 400*l.* which he owes me on mortgage of his estates in Shropshire, and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at my decease, with all interest due thereon." N. D. had given the testator a bond as a collateral security for the mortgage money. N. D. died before the testator. This is a lapsed legacy, and the executor of N. D. must pay the money.

In order to prevent a legacy from lapsing by the legatee's death it is necessary to substitute another legatee in his stead.

1787.
Dec. 13.
1789.
Hil.

EYRE, C.B.
HOTHAM, B.
THOMPSON, B.
[118]

THE principal question in this cause was, whether a debt contracted originally by Nightingale Draper to Jacob Tonson was still owing to the estate of Jacob Tonson, or whether the same was under the circumstances of the case, *either extinguished by J. Tonson's will, or should be presumed to be paid or satisfied. The point was made principally in the cross cause, the bill in which prayed that the estate might be declared to be discharged from the mortgage and the bond delivered up.

[*119]

On the 1st May, 1754, Nightingale Draper became indebted on bond to Jacob Tonson in 200*l.*

By indentures of 11th and 12th days of May, 1759, Nightingale Draper mortgaged an estate to which he was entitled in remainder after the death of Elizabeth Cripps, for securing the sum of 500*l.* to Jacob Tonson, being money lent by Tonson to him; and also executed a bond for that sum bearing even date.

On the 7th day of March, 1763, Jacob Tonson made his will, in which was the following clause: "I give to my kinsman Nightingale Draper the sum of 400*l.* which he owes me on mortgage of his estate in Shropshire; and I further order my executor herein after named to give him up all bonds owing from him to me, and which shall be found in my custody at the time of my decease, together with all interest due thereon."

On the 1st of November, 1763, interest was paid on the bond for 200*l.* which was the last sum that appeared to have been paid for interest on either of the debts.

On the 14th November, 1764, Nightingale Draper died, and

1787.
 TOPLIS
 v.
 BAKER.

Ann Draper was his administratrix; and afterward, Jacob Tonson sold to Ann Draper a small annuity which he regularly paid her.

In March, 1767, Jacob Tonson died and left Richard Tonson his brother, and heir, and executor, and principal legatee.

In October, 1772, Richard Tonson died, and in December following administration was taken out to him; and in January, 1775, administration *de bonis non* to Jacob Tonson by defendant Baker.

In May, 1776, the debt was first demanded of Ann Draper, which produced a letter from one Marye an attorney, who speaks of the debt of 500*l.* as an existing debt, but suggests that the former debt of 200*l.* was included in it.

[*120]

*On 31st March, 1783, Ann Draper died.

On 28th Feb., 1784, Elizabeth Cripps died, when the mortgaged reversion fell into possession.

This case stood for the judgment of the Court until the sittings after Hilary Term 1789, when the LORD CHIEF BARON delivered the opinion of the Court:

EYRE, LORD CHIEF BARON (after stating the will of Jacob Tonson and the other circumstances above mentioned, together with other parts of the case which did not apply to the question argued):

Nightingale Draper died in the lifetime of Jacob Tonson and Ann Draper took out administration to him. Jacob Tonson assisted her in collecting in his effects, and afterwards sold her a small annuity; and it does not appear that he ever demanded of her the debt due from Nightingale Draper. Richard Tonson, his brother and executor, made no demand of the debt. On his death Baker took out administration to both Jacob and Richard Tonson; and in 1776 demanded of Ann Draper the payment of this debt. Mr. Marye an attorney answered the letter on her behalf, and admits the debt. The object of the original bill being (amongst other things) to obtain payment of this demand, the cross bill was brought to controvert it, and it prayed that the estate might be declared to be exonerated from the mortgage, and that the bond might be delivered up to be cancelled. As

incidental to this, we have to discuss the interest of Baker in this mortgage debt. The language of Jacob Tonson's will, and the conduct of him and of his brother Richard Tonson, afford very probable grounds of supposing that both parties understood the representatives of Nightingale Draper never were to be called upon for the bond or mortgage; but a judicial exposition of the intention of the testator as expressed in his will ought to be of much closer texture; and we cannot call in parol evidence to decide this. The question for our decision is what the testator has expressed in the instrument, not what idea was fluctuating in his mind; and what is the effect of what he has so expressed. Now no rule is more established than that a testamentary disposition must lapse *by the death of the party, to whom the benefit is given, in the lifetime of the testator. A hard instance of this is that where an estate is given to A. and his heirs, and A. dies in the lifetime of the testator, his eldest son cannot take the estate. Two cases have been cited in the argument of the present, but they both agree in the rule I have mentioned, and they say that the will must be specially penned to prevent the lapse. If this means that some other person must be substituted by the will in the room of the legatee dying, then I think it is a clear proposition; but I doubt whether any thing else will do; put the case of a testator saying "I give to A. and if A. shall die before me, yet I do not mean the legacy shall lapse;" I should not know how to prevent this legacy lapsing: but if the testator had said "If A. shall die I mean his executors shall take it," then I understand the effect very clearly, the executors being specially mentioned and substituted for the legatee. *Sibthorpe v. Mozom*† went one step further; according to the report of that case Lord HARDWICKE laid stress on the representative of the legatee being of the blood of the testator; and also some stress on the word "forgive," as being capable of operating a release in equity as against executors, though not against creditors; but the main ground was, that there was nothing in the will to confine the delivery of the bond to the person of the son-in-law: and therefore it was not ancillary to the former bequest to him, but it amounted to a declaration that

1787.

TOPLIS

v.
BAKER.

[*121]

† 3 Atk. 580.

1787.
 TOPLIS
 v.
 BAKER.

in all events the bond should be delivered up, and therefore of necessity operated for the benefit of the representative.

[*122]

Now let us see whether the case before the Court can be taken out of the general rule by any principle or analogy. The testator first gives to N. Draper the sum of 400*l.* which he owed the testator on mortgage, and the direction to the executor is to deliver up to Nightingale Draper all bonds owing from him to the testator, and which should be found in the testator's custody at the time of his decease. Here the word in the principal member of the devise is "give" and not "forgive," and the direction for the *delivery up of the bond is to N. Draper personally; and there is no direction at all for the delivery up of the mortgage, so that the gift of the mortgage depends entirely on the first member of the devise. The result of these observations is that none of the circumstances of *Sibthorpe v. Moxom* are to be met with in this case: but this is in substance the same as *Elliot v. Davenport*,† as far as that case goes; but in two respects the present case is stronger; first, because in *Elliot v. Davenport* the security was directed to be delivered to the executors and administrators of the legatee; and, secondly, because in this case the mortgage is not directed to be delivered up at all. In the teeth therefore of the general rule, and of a case in point, however hard the present case may be, (and so it appears to us, and for that reason we hoped to have found a ground for saying the legacy was not lapsed) on the best consideration we can give the point, we find it impossible to deny that it is a lapsed legacy.

[His Lordship then decided that the mortgage was not extinguished by any presumption of payment, and the bill so far as sought to set aside the mortgage was dismissed.]

† 1 P. W. 83.

CLARKE v. COBLEY.

(2 Cox, 173—174.)

1789.

Rolls Court.
 ARDEN, M.R.
 [173]

A woman at the time of her marriage was indebted on two promissory notes. After the marriage, the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit the husband pleaded his infancy at the time of giving the bond. On a bill filed in this Court for relief, the Court ordered the notes to be returned to the plaintiff with directions that the defendant should not plead the Statute of Limitations to any action the plaintiff should bring on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given. But this Court will not order the immediate payment of the money.

THE defendant's wife before her marriage had made two promissory notes to the plaintiff in the months of August and November, 1780. The defendants afterwards intermarried, and in Nov. 1786, the husband gave the plaintiff his bond for the amount of the two notes, and thereupon the plaintiff delivered them up. On the bond being put in suit against the husband, he pleaded infancy at the time of executing the bond. On this the plaintiff filed the present bill, praying that the defendant the husband might either pay the money or execute a new bond to the plaintiff, or deliver back the notes of the wife. The fact being admitted by the defendant, the cause came on upon bill and answer.

His Honour was clearly of opinion that the plaintiff was entitled to have the notes delivered back to him; and it appearing that the Statute of Limitations had not run against the plaintiff's demand at the time of his giving the bond, his Honour ordered that the defendant should not plead the Statute of Limitations to any action to be brought by the plaintiff on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given.

It was pressed on the part of the plaintiff that under these circumstances there should be a decree at once for payment of the money, but his Honour said he could only take care that the parties were put in the same situation in *which they were at the

[*174]

1789.
CLARKE
v.
COBLEY.

time of the bond being given, which was done on the principle that an infant shall not take advantage of his own fraud; but the defendant might still have some good plea or defence at law, which this Court would not deprive him of.

1789.
July 16.

*Lincoln's Inn
Hall.*

THURLOW,
L.C.

[180]

STANLEY v. POTTER.

(2 Cox, 180—183.)

A bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally.

EDWARD STANLEY, by his will of the 29th day of Oct. 1777, reciting that some time in or about the month of Jan. 1772, he the said testator had advanced and lent unto James Campbell, of Craignash, in Scotland, the principal sum of 2,000*l.* sterling, and for securing the repayment thereof, with interest at 5 per cent. per ann. or an annual rent of 100*l.* sterling, with liquidate penalty, expenses of enfeoffment and termly failzies, the said James Campbell did duly execute to him the said testator his the said James Campbell's certain heritable bond, bearing date the 27th day of January, 1772, and thereby and by a ratification thereof by Mrs. Ann Campbell, wife of the said James Campbell, bearing date the 12th day of February, 1772, and instrument of sasine taken upon the said heritable bond, dated the 27th day of January, 1772, divers lands, islands, and other hereditaments and premises were and stood charged with the due payment of the said principal sum of 2,000*l.*, and interest, or annual rent of 100*l.* for the same in manner therein mentioned, he the said testator gave and devised that all the said annual rent of 100*l.* sterling or such annual rent, less or more, as by the law for the time being should correspond to the said principal sum of 2,000*l.* to be taken as aforementioned, and all the said lands and premises for and in real security, and more sure payment of the said 2,000*l.*, sterling &c. and all his estate, right, title, and interest therein to the several uses, and upon and for the several trusts,

intents, and purposes therein after mentioned, (that is to say), to the use and behoof of John Latham and Thomas Potter, their executors, administrators and assigns, for and during the term of 99 years, in case his the said testator's daughter Anne Stanley should so long live, upon the trusts, and to and for the intents and purposes therein after mentioned and expressed concerning *the same, and from and immediately after the expiration of the said term, and in the mean time subject thereto, to the use and behoof of George James Stanley for life, &c. &c. with divers limitations over. And in case the said sum of 2,000*l.* should at any time thereafter be paid off and discharged, then the said testator did will, order, and direct that the same should be paid unto and received by the said John Latham and Thomas Potter, or the survivor, &c. and the said testator did thereby will and direct that they his said trustees should, as soon as conveniently might be after the receipt thereof, lay out and invest the same in the purchase of freehold lands, tenements, and hereditaments, to be settled and conveyed to and upon the same uses, trusts, and purposes, as therein before limited and declared concerning the said annual rent and premises aforesaid; and in the meantime and until such purchase could be had, he directed that the said sum of 2,000*l.* should be laid out and invested by his said trustees in government securities, and the dividends thereof should be paid to such person or persons as would be entitled to the rents of such lands if purchased.

In the year 1786 James Campbell paid off the debt of 2,000*l.* to the testator; but the testator left his will unaltered in respect of the bequest of the 2,000*l.* and died in the month of January, 1789. There being no particular circumstances in the case respecting the mode in which this debt was paid off, or the appropriation of the money by the testator in his lifetime, the question now was whether this bequest was not adeemed by the debt being paid to the testator before his death.

1789.
STANLEY
v.
POTTER.

[*181]

Lloyd in support of the bequest observed that in the case of *Attorney-General v. Parkyn*, Lord CAMDEN held that there was no distinction between a voluntary payment and a payment on demand, although some of the old cases seem to have adverted

1789.
STANLEY
v.
POTTER.
[*182]

to that; but he was of opinion that where the amount of the debt was specified in the bequest, it became a general legacy, although it would otherwise have been a specific one; admitting however at the same *time that the ground, on which he went, was slight. Now if the case of *Attorney-General v. Parkyn* stood undisturbed, it certainly would be a case in point to support the present bequest, for here the sum is named; but it must be allowed that in *Ashburner v. M'Gwire*, 2 Bro. Cha. Rep. 108, the Court does not appear to acquiesce in the doctrine of the former case. In *Saville v. Blacket*, 1 P. W. 779, Lord MACCLESFIELD is made to say that "if a legacy be given to J. S. to be paid out of a particular debt, and there should not appear to be any such debt, or the fund fail, still the legacy ought to be paid, and the failure of the *modus* appointed for the payment should not defeat the legacy itself."

LORD CHANCELLOR:

When the case of *Ashburner v. M'Gwire* was before me, I took all the pains I could to sift the several cases upon the subject, and I could find no certain rule to be drawn from them, except this, to inquire whether the legacy was a specific legacy (which is generally the difficult question in these cases), and if specific, whether the thing remained at the testator's death; and one must consider it in the same manner as if a testator had given a particular horse to A. B. if that horse died in the testator's lifetime, or was disposed of by him, then there is nothing on which the bequest can operate. And I do not think that the question in these cases turns on the intention of the testator. The idea of proceeding on the *animus adimendi* has introduced a degree of confusion in the cases which is inexplicable, and I can make out no precise rule from them upon that ground. As to the case of *Attorney-General v. Parkyns*, I collect from the note I read of that case, that Lord CAMDEN would have had great difficulty in making those legacies contributory in the event of a deficiency of assets; and if so, I cannot conceive how they are to be taken as general legacies for any other purpose; they must have had all the consequences of general legacies, or none; they could not be specific to one purpose, and general to another. This I can-

not understand. And I believe it will be a safer and clearer way to adhere to the plain rule which I before mentioned, which is to inquire whether the specific thing *given remains or not. For where a testator gives by his will a particular sum of money, and he afterwards receives and spends it, I see no end to the confusion arising from the following any other line.

His Lordship therefore declared the legacy to be adeemed.

1789.
STANLEY
POTTER.
[*183]

VINER v. FRANCIS.†

ON FURTHER DIRECTIONS.

(2 Cox, 190—192.)

Gift by will to the children of a deceased sister, is a gift to those who were living at the death of the testator.

1789.
July 28.
Rolls Court.
ARDEN, M.R.
[190]

JOHN WIGGINGTON by will gave to his brother Samuel Wiggington 6,000*l.* in trust for the use and benefit of his children, to be equally divided between them, either in his lifetime or at his death, when, and in such manner as he should judge most convenient and beneficial to them. He gave to his sister Martha Selby 3,000*l.* the interest of which he gave to her for her own use during her life; and at her death he desired the principal might devolve to her son Miles Selby, unless she should have more children, and then the same sum to be shared equally between them. He then added, "Item, I give unto the children of my late sister Mary Crowser, the sum of 2,000*l.* to be equally divided among them. Note, To the above three legacies I desire 100*l.* may be paid to each within one month after my decease, to buy mourning, &c." And after giving several other legacies, he gave the residue, after payment of debts and legacies, thus: "I give unto my brother Samuel Wiggington one-third of the residue, and one-third more to my sister Martha Selby, and the other third I give to the children of my late sister Mary Crowser, equally to be divided between the children of my brother Samuel

† *Dimond v. Bostock* (1875), L. R. 10 Ch. 360.

789.
VINEY
C.
FRANCIS.
[*191]

Wiggington, my sister Martha Selby, and the children of my late sister Mary Crowser."

*At the date of the will there were three children of Mary Crowser living, viz. John, Elizabeth, and William. William died after the date of the will, in the lifetime of the testator; and it was contended that one-third of one-third of the 2,000*l.* given to the children of Mary Crowser lapsed into residue, and that one-third of the residue lapsed, and was payable to the next of kin, as undisposed of.

MASTER OF THE ROLLS :

There is no doubt in this case on the bequest to the children of Samuel Wiggington, for all his children were living at the death of the testator. It was once indeed thought that a bequest to "the children of A." might extend to all children born at any future time; but *Derisme v. Mello*† has settled that such children shall take, as are born at the time the distribution of the fund is to take place. The doubt in this case arises on the clause which gives "to the children of my late sister Mary Crowser" the sum of 2,000*l.* to be equally divided. As I said before, the general rule as settled by *Derisme v. Mello* is, that the children living at the time of the distribution of the fund, shall take; if it is to be distributed at the time of the testator's death, then such children as shall be then living; if distributable at the death of some other person, then the testator is to be supposed to mean such children as shall be living at the time of the death of such other person. Then the question is, whether a gift to the children of his late sister Mary Crowser is or is not indicative of an intention different from that which would be imputed to him under the general rule, that is, whether he meant the particular children living at the time he made his will, to take the fund equally between them, or whether it was not the same thing as if he had given the 2,000*l.* "to the three children of my late sister;" for in that case it would have been a legacy to three *personæ designatæ*. Now when a testator gives a fund to be divided amongst his own children, he shall be supposed to mean such children as shall be living at the time of his death.

† 1 Brown, Ch. Rep. 537.

If so, why should I suppose that the sister being dead, he meant any thing else than what would be imputed to him in the other *case. This is not like the case of *Lord Bindon v. Earl of Suffolk*, 1 P. W. 96, for there the gift is to the five grandchildren, which shows that he had particular objects in view. But the general rule, I take it, comes to this, to exclude all children, who, although living at the date of the will, yet die before the testator, and to include all those who are living at the time of the distribution, although born after the will or the death of the testator.—Reg. Lib. B. 1787, fol. 752, and 1788, fol. 534.

1789.
VINEY
v.
FRANCOIS.
[*192]

ECCARD v. BROOKE.

ON FURTHER DIRECTIONS.

(2 Cox, 213—218.)

Bequest of stock to trustees in trust after the death of A. to transfer the same to and amongst all and every the nephews and nieces that should be then living, "to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children, and S. E. or her children." Under this bequest a nephew not expressly named is not entitled to any share. And the fund is equally divisible amongst such nephews and nieces and their children as were living at the time of the death of A.

1790.
Feb. 8.
Rolls Court.
ARDEN, M.R.
[213]

LOUISA LAFITTE made her will, bearing date the 18th May, 1759, and thereby (amongst other things) bequeathed the sum of 1,000*l.* three per cent. bank annuities, and 1,000*l.* 4 per cent. bank annuities, of which she was then possessed, to her son James Lafitte, and to Stephen Gardest, their executors and administrators, upon trust to apply and pay the dividends thereof as the same should become payable to the said James Lafitte to be by him applied towards the maintenance and education of all and every the child and children to *be by him begotten, until such child or children should attain the age of 21 years, and then upon trust to transfer the principal stock to or amongst such child or children in manner therein mentioned; and in case the said James Lafitte should have no child of his body lawfully begotten, or having such they all should die under the age of 21

[*214]

1790.
 ECCARD
 v.
 BROOKE.

years, then upon trust to pay, apply, and dispose of the interest, dividends, and proceeds of the said stock unto the said James Lafitte during his life, and from and immediately after his decease without issue then living as aforesaid, the said testatrix declared the trusts of the said bank annuities in these words: "Then upon this further trust that the said Stephen Gardest, his executors or administrators, do and shall transfer, sell, and dispose of the said annuity, stock or stocks, and pay the money arising from such sale unto and amongst all and every the nephews and nieces that shall be then living as well on the side of my late husband, as of mine, (to wit) the said Jane Blundy or her children, and the said Peter Brozet or his children, and David Lafitte or his children, and Peter Lafitte or his children, and the said Susanna Eccard or her children, to be equally divided between them share and share alike; but my express will and meaning is, that the part or share of the said Jane Blundy (who is one of the nieces of my said late husband) shall be paid into the proper hands of the said Jane Blundy for her own sole and separate use." And the said testatrix thereby appointed the said James Lafitte and Stephen Gardest executors.

James Lafitte died in August, 1787, without issue. Peter Brozet, David Lafitte, and Peter Lafitte all died without issue in the lifetime of James Lafitte, at whose death the said Jane Blundy was living, having intermarried with the defendant George Brooke; and Susanna Eccard had died in the lifetime of James Lafitte, leaving the plaintiffs Jacob Eccard and Susanna Potter her two only children. It also appeared that the testatrix had another nephew not named by her in her will, namely, Lewis Brozet (the brother of the said Peter Brozet) who died in the lifetime of the *said James Lafitte, leaving Mary Brozet, his only child, who was not originally made a defendant in the present cause.

[*215]

The plaintiffs by their bill claimed one moiety of the said two sums of 1,000*l.* and 1,000*l.* bank annuities, insisting that they were so entitled as the only children of Susanna Eccard, and that the other moiety belonged to the said Jane Brooke, and prayed a transfer thereof accordingly, or in such other proportions as the Court should think fit.

This cause came on to be heard on 9th December, 1788, when his Honour referred it to the Master to inquire and state * * to the Court whether the said testatrix had any and what nephews or nieces of her husband Timothy Lafitte, or of her own, besides Jane Blundy (then Brooke) Peter Brozet, David Lafitte, Peter Lafitte, and Susanna Eccard, named in her will, and whether any and which of the nephews and nieces named in her will, besides the said Jane Brooke, or any and what child or children of any such nephews or nieces were living at the death of James Lafitte her son, and whether the said Jane Brooke had any and what child or children living at the death of the said James Lafitte, and whether any and what child or children of any nephew or niece of the said testatrix not named in her will, was or were living at the death of the said James Lafitte.

1790.
ECCARD
v.
BROOKE.

On 20th July, 1789, the Master made his report, and thereby certified that * * Mary Brozet was the only child of Lewis Brozet, who was a nephew of the testatrix, but who died in the year 1770, and that the testatrix had no other nephews or nieces except those named in the bill and the said Lewis Brozet, and that there were no other children of nephews or nieces except the plaintiffs and the said Mary Brozet.

The cause coming on to be heard for further directions on this report, his Honour directed it to stand over, with *liberty for the plaintiffs to amend their bill by making Mary Brozet a party; which was accordingly done, and she having put in her answer, the cause now came on again to be heard.

[*216]

On the part of the defendant Jane Brooke, it was strongly insisted that she was entitled to one half of the funds; that the true construction of this clause was, that such nephews and nieces enumerated under the *videlicet*, as were living at the death of James Lafitte, should take equally; but if any of them were then dead leaving children, then such children should take the share their father or mother would have been entitled to, if living; that this construction would give effect to the word "or" which otherwise must be arbitrarily changed into the word "and," for which there was no sufficient occasion.

1790.

ECCARD;
v.
BROOKE.

The plaintiffs insisted they were entitled equally in thirds with Jane Brooke, and that the word "or" must be construed "and" to avoid the uncertainty which would arise, whether the nephew or the children of the nephew should take; and then the children must take equally with their father or mother, according to the express words of the will, which directs them to take share and share alike.

The claim of Mary Brozet rested on the generality of the words in the beginning of the clause which gave the fund to all and every the nephews, &c. which could not be controlled by the testatrix having evidently omitted, in the enumeration, the name of one of the nephews.

MASTER OF THE ROLLS:

[*217]

The event having happened that James Lafitte died without issue, it now becomes necessary for the Court to determine who are the persons entitled under the words of this will to the three and four per cent. bank annuities. When the cause first came on, I doubted whether under the words "all and every the nephews and nieces, &c." any person might not claim a share who answered that description, though not enumerated under the *videlicet*, and I therefore directed the inquiry what nephews or nieces, or children of nephews or nieces, the said testatrix had: and it now turns out that besides the plaintiffs, who were the children of Susanna Eccard, and *the defendant Jane Brooke, who was a niece, there is also Mary Brozet, the child of Lewis Brozet, a nephew of the testatrix, but who is not named under the *videlicet*. And therefore the question arises, whether the generality of the words, "all and every the nephews and nieces, &c. is or is not restrained by the *videlicet* to the persons there particularly named. At first I was inclined to think that under these general words Mary Brozet might have taken a share; but upon consideration I think I must confine it to the persons named under the *videlicet*. They were near relations, and it can hardly be supposed that the testatrix had forgotten Lewis Brozet; and I therefore must consider her as having by the enumeration made, described who she meant by all the nephews and nieces; and consequently that Mary Brozet cannot take a share.

Then the question arises, in what proportions the plaintiffs and the defendant Jane Brooke are to take. On the one hand it is said, that the construction of this clause should be that the nephews and nieces should each take a fifth, if all living; but if any of them should be dead at the time of the distribution, then that the children of each one so dying should take their father's or mother's share. On the other hand it is argued, that no such intention is to be collected from the words of this clause, but that the several persons named or described under the *videlicet*, that is, the nephews and nieces and their children are expressly directed to take equally and share and share alike; and consequently that the plaintiffs, the two children of Susanna Eccard, and the defendant Jane Brooke must take in thirds; and I am of opinion that they are equally entitled, and that the word "or" is not to be construed as making a substitution, but a description of all the persons to take; that is, that the testatrix meant to give the fund to all such persons, whether they had the character of nephews and nieces, or the children of nephews and nieces. It would be absurd to state all the cases in which the word "or" has been construed "and"; but many such are to be found in the books. If I did not construe it so in this *case, I must either adopt the argument that it was meant to substitute the children of each nephew or niece, who should happen to die, in the room of their father or mother, for which I see no sufficient ground; or I must say the clause is so uncertain that I can give it to none; for if the words are strictly adhered to, this uncertainty will arise. Although it was not very probable that a case should occur in print that would be an authority for this, yet it so happens that in 1 P. W. 434, there is the case of *Richardson v. Spraag*, which comes very near to the present. In 2 Eq. Ca. Ab. a memorandum is subjoined to the note of this case, which observes that the construction might be made that such of the daughters who were living should take, and the children of such as were dead should take their mother's shares; but I cannot say I find myself justified in going so far out of the words of the will, and do not agree with the observation made in 2 Eq. Ca. Ab. Therefore I am of opinion that the plaintiffs and the defendant Jane Brooke must take equally; and if Jane

1790.
ECCARD
v.
BROOKE.

[*218]

1790. Brooke had had any children, that such children would have
 ECCARD taken equally with their mother, as done in the case of *Blackler*
 v. *Webb*, 2 P. W. 383.
 BROOKE.

EX PARTE BENTLEY.

PETITION IN THE BANKRUPTCY OF MALTBY AND ANOTHER.

(2 Cox, 218—219.)

A creditor under a joint and several bond given by partners who subsequently became bankrupt may prove against both the joint and separate estate, but must make his election before a dividend.

THIS petition prayed that the separate certificate of Maltby might be stayed, and that the petitioner might be at liberty to prove a bond debt of 3,500*l.* under the commission for the purpose of assenting to or dissenting from the certificate.

[*219] There had been many meetings under the commission, at which the petitioner might have proved this debt; but *it was alleged on his behalf that the bond being a joint and several bond of both the bankrupts, he had deferred proving the debt until he should be able to determine whether it would be most beneficial to him to prove against the joint or the separate estate.

The LORD CHANCELLOR said:

He apprehended it to be the constant course for creditors under these circumstances to be admitted to prove under both the joint and separate estate, so as they made their election before a dividend. And therefore there was no excuse for the petitioner not having proved his debt long ago. And dismissed the petition.

GARRICK *v.* EARL CAMDEN.

(2 Cox, 231—232.)

A manor was sold under the decree of the Court as part of the real estate of the testator; and an order was made on the 13th March that the purchaser should, on or before the 17th day of May, pay his purchase-money into Court, and be let into possession of the profits from Lady-day. Several deaths had taken place prior to Lady-day, but the admissions and fines due thereon had been postponed until after that time, no Court having been holden. These fines belong to the vendors and not to the purchaser.

1790.
May 17.
THURLOW,
L.C.
[231]

THE real estates of David Garrick, the testator in this cause, were by the decree ordered to be sold, and the money arising from the sale directed to be paid into the bank, &c. The estates were accordingly sold before the Master, and the first lot comprized the manor of Hendon.

John Bond having been reported the best bidder for lots No. 1 and No. 2, by an order made in this cause on the 13th March, 1790, it was ordered that the said John Bond should, on or before the 17th day of May, pay the sum of 16,940*l.* the amount of his purchase-money, into the Bank, and should be let into possession from Lady-day. The profits of this manor arising chiefly from fines upon deaths and alienations, it happened that several deaths and alienations had happened before Lady-day, the fines on which had not been paid or assessed, the general Court being holden only once a year, and this year happening on the 18th May. It was now moved on the part of the vendors that the order made on the 13th March might be amended, by excepting, out of the profits which by the order the purchaser was to take from Lady-day, the fines payable on account of the deaths of such copyhold tenants of the said manor previous to Lady-day, and that the vendors of the said manor might be at liberty to make use of the name of the said John Bond the purchaser to recover such fines, first indemnifying the said John Bond with respect thereto, or that the said John Bond should be directed to collect and receive all such fines payable on account of such deaths or alienations upon the admission of the heirs, devisees, and purchasers, or any of them, and account for and pay over the same to the vendors of the said manor.

1790.
 GARRICK
 v.
 EARL
 CAMDEN.
 [*232]

And for the vendors it was insisted that the right to these fines having accrued before Lady-day, although, on account of no Court being holden, the admissions had not taken place, and therefore the title of the Lord to the fines *was not complete until afterwards, they could not pass as subsequent profits of the manor, and therefore that the order should be altered in the manner prayed.

The *Solicitor-General* for the purchaser argued that the fines being on the admissions, and the admissions happening after Lady-day, they became then and not before the profits of the manor; and that it required some special case to be made on behalf of the vendors to entitle them to this relief in equity, but that at any rate this could not be done on this summary application.

But the LORD CHANCELLOR said he thought the justice of the case very clearly was, that the fines accruing on deaths or alienations which happened before Lady-day were to be considered as having accrued before that time; and that the Court, if it had been apprized of the fact, would have made the order in the way now prayed. And his Lordship amended the order according to the notice of motion, viz. that the purchaser should receive the fines and pay them over to the vendors.

1790.
 Trin. Vac.
 —
 Lincoln's Inn
 Hall.
 THURLOW,
 L.C.

CREUZE v. HUNTER.

(2 Cox, 242—243.)

The Court of Chancery will under circumstances of improper conduct intervene to prevent a father from interfering in the education, &c. of his son, being a ward of the Court.

THIS was a petition stating the entangled state of Mr. Hunter's property; that he was an outlaw and resided abroad, and that his son an infant was entitled in remainder to a very considerable estate, as also to a maintenance by the will of his grand-

father ; and prayed that Mr. Hunter might be restrained from taking his son abroad or improperly interfering with his education, which was then principally directed by his mother, who lived separate from her husband.

1790.
CREUZE
v.
HUNTER.

*Affidavits were filed on both sides, imputing very improper conduct to both father and mother.

[*243]

Upon the petition first coming on, the LORD CHANCELLOR threw out that he would not allow the colour of parental authority to work the ruin of his child. And afterwards ordered that his father should be restrained from interfering with the management of his child without the consent of Lord Hawke and Mr. Adams, whom both parties allowed to be proper persons for such a purpose.

N.B.—The Jurisdiction of the Court being questioned by the counsel for Mr. Hunter, the LORD CHANCELLOR observed, that he knew there was such a notion ; but he was of opinion that this Court had arms long enough to reach such a case, and prevent a parent from prejudicing the health or future prospects of the child : and that whenever a case was brought before him he would act upon this opinion : if the House of Lords thought differently, they might control his judgment ; but he certainly would not allow the child to be sacrificed to the views of the father.

EX PARTE BULTEEL.

PETITION IN THE BANKRUPTCY OF PHILIP AND JOHN LEIGH.

(2 Cox, 243—247.)

The delivery of title deeds to an attorney to prepare a mortgage deed does not amount to an equitable mortgage ; otherwise, if deposited expressly as a security for a debt.

1790.

Lincoln's Inn
Hall,
THURLOW,
L.C.

THIS was the petition of Bulteel, Harris, and Scott, Bankers at Plymouth, (commonly called the Naval Bank,) praying to have certain ships of the bankrupts and certain real estates of

1790.
Ex parte
BULTEEL.

the bankrupt Philip Leigh sold, and the produce applied towards discharge of the debt due to the petitioners, and that the petitioners might prove the remainder under the commission, insisting that the transactions mentioned in the petition amounted in this Court to a mortgage of such ships and real estates respectively. * * *

[*246] *With respect to the real estate of Philip Leigh it was admitted,

That the Naval Bank sometime after the receipt of the bills of sale pressed for a real security on account of the largeness of their debt, which Philip Leigh at first objected to, but on the 11th of November wrote to the Naval Bank, as follows: "I will give you the landed security well worth 6,000*l.* which with that you have already is 17,000*l.*, if you will agree to let the balance remain at 10,000*l.* and provided we reduce the balance to 6,000*l.* that you will give up the shipping security and retain the landed."

That the petitioner Harris told Philip Leigh that the security should prepared by any attorney Leigh should name, and Mr. Rosdew was fixed upon for the purpose.

That Philip Leigh sent the title deeds to the Naval Bank on the 15th of December 1788, and the Naval Bank delivered them to Mr. Rosdew with instructions to prepare a security for 6,000*l.*; 3,600*l.* part of it for Philip Leigh's debt.

That the said Richard Rosdew accordingly drew and engrossed conveyances of the estates to himself, (as trustee for the Naval Bank,) for sale, if the said sum of 6,000*l.* was not paid after six months' notice in writing for that purpose.

Before the execution of these conveyances P. and J. Leigh became bankrupts. * * *

[247] The LORD CHANCELLOR said that, as to the real estate, the case did not come within the rule which has been established in this Court, viz. that the deposit of title deeds as a security for money shall be taken as a mortgage, for that here the deeds were not deposited expressly as a pledge for securing any particular sum, but were delivered to an attorney for the purpose of enabling him to prepare a security which was to be after-

wards executed; but the bankruptcy intervening prevented that transaction being effected.

And his Lordship dismissed the petition.

1790.

Ex parte
BULTEEL.

N.B.—There was a circumstance also proved in this matter which was intended to be relied upon on the part of the assignees, viz. that Leigh had fraudulently obtained these title deeds from an old lady his relation, to whom he had before mortgaged these same real estates, and who had therefore a prior equitable interest to the petitioners; but the LORD CHANCELLOR declared he did not at present take that matter into consideration.

ROBERT BRAY O'REILLY v. WILLIAM
THOMPSON.

(2 Cox, 271—273.)

1791.

Easter Term.

Exchequer.

EYRE, L.C.B.,
THOMPSON, B.

[271]

Agreement by parol that upon plaintiff's procuring a release of right from a stranger, defendant would convey. Plaintiff procures the release by paying a valuable consideration. This is not a part performance, and the Statute of Frauds may be pleaded to a bill for specific performance of such an agreement.

THE bill stated, that the plaintiff having entered into a treaty with defendant for the purchase of his remaining term as lessee of a house in Great Marlborough Street, behind the Pantheon, defendant declared that he was ready to treat with the plaintiff for granting a lease of the said messuage or tenement to him, but plaintiff must get rid of a treaty then pending between the said defendant and John Hammond by a proper release; "and it was then finally concluded and agreed upon and fully understood by defendant and plaintiff, that upon the plaintiff obtaining from the said John Hammond a release of his claim to said messuage or tenement, said defendant would immediately grant plaintiff a lease thereof for the whole of the said defendant's term, reserving a few days; and that he would deliver up to plaintiff the possession of the same at Michaelmas then next; and that plaintiff should thereupon pay to defendant the sum of 42*l.* and be subject to the same rent, taxes, and covenants as the said

1791.
O'REILLY
v.
THOMPSON.

[*272]

defendant was then subject to by virtue of the lease under which he then held the said messuage or tenement ;" that the plaintiff thereupon obtained a release from Hammond of all his right, upon consideration of his giving Hammond the free admission of the Pantheon, value 15*l.* per annum ; which plaintiff accordingly granted and secured by a proper instrument : that plaintiff acquainted defendant with the agreement he had made with Hammond, and defendant delivered over his lease to the plaintiff for the purpose of having a proper underlease prepared ; that it was *prepared accordingly and assented to by the defendant at several successive meetings held for the purpose of executing it ; but at last the defendant positively refused to perform his agreement, then saying he should act in the business as Richard Brinsely Sheridan, Esq. should desire him, in spite of any former agreement whatsoever ; that the plaintiff thereupon executed a counterpart of the underlease, and tendered the 42*l.* premium.

The bill charged the fact of the plaintiff's having obtained Hammond's release at the price above-mentioned, as part performance of this parol agreement, and prayed specific performance.

To this bill the defendant pleaded the Statute of Frauds.

Partridge and Abbot, for plaintiff :

To a mere verbal agreement stated in the bill the statute is a proper plea ; but if a verbal agreement be part performed and so alleged, the statute is no plea, 1 Ves. sen. 441, 221 ; or at least without an answer denying the part performance. This agreement is in part performed. The nature of the agreement is conditional, viz. if the plaintiff should obtain a release from Hammond, and pay 42*l.* to defendant, the defendant would grant a lease. Plaintiff has performed the condition on his side by obtaining a release at the price of a privilege worth 15*l.* per annum. And this is such a part performance as takes the case out of the statute. The rule is that nothing conciliary or introductory will do ; but the act done must be material and done in pursuance of the contract and such as will be prejudicial to the party performing it, if the agreement be not carried through, i.e. it must not be perform-

ance of any thing extrinsic to the contract, but a performance of part of the contract; *Gunter v. Halsey*, Amb. 586; *Foxcroft v. Lister*, 2 Vern. 456: and it must be an act done with manifest intention of being in part performance; *Whitbread v. Brockhurst*, 2 Bro. 404; *Whitchurch v. Bevis*, 2 Bro. 559. And this case at bar is within this rule; because the purchase of his release is a damage to the plaintiff, if the agreement be not carried through; for of what use is the release of Hammond's preference, if still the house is not to be the *plaintiff's. The same act, viz. of a condition performed, does not appear anywhere to be identically decided upon; but it is similar in principle to all the common cases, such as laying out money in improvements upon stipulation for a future lease, &c. all of which take the case out of the statute, because they are acts prejudicial to the party doing them, if the contract does not proceed.

1791.
O'REILLY
v.
THOMPSON.

[*273]

Burton and Scafe, for defendant :

It is admitted that this case stands only on the part performance, and that the act done should be material: but this is merely a preparatory act. A part performance is something which the plaintiff has contracted to do, and here is no agreement that plaintiff shall be bound to procure the release; but it is, that upon his doing so, then that the defendant shall grant the lease.

EYRE, LORD CHIEF BARON :

My opinion inclines that these circumstances are not a sufficient part performance, but they are a condition annexed, and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract. Tender of 42*l.* and lease and delivery of original lease are no part performance, but circumstances of preparation. So this obtaining the lease is no part performance, but merely preparatory. The detriment to the plaintiff arises from the folly of acting without a written contract. I do not incline to extend the cases of part performance; they have raised the very mischief which the statute intended to prevent. If this is a question simply on the part performance, the plea should be allowed.

1791.

THOMPSON, BARON :

O'REILLY
r.
THOMPSON.

This is a mere question of part performance. If a sufficient part performance is alleged then it must be answered; but if the Court should think that these are not sufficient circumstances, then the plea is good.

Plea allowed.

1791.

July 7.

*Before
the Privy
Council.*

[274]

ORR v. NEWTON.

(2 Cox, 274—277.)

Executor, who has not proved, not considered as acting, by assisting a co-executor who had proved in writing letters to collect debts.

Nor by writing directly to a debtor of the testator, and requiring payment.

In 1764 Peter Carew died having made his will, under which Newton, the respondent, was one of five executors, and the appellant claimed as personal representative of the two residuary legatees.

In 1766, Popham one of the executors died.

In 1774, Philips another executor died.

In 1785, the appellant filed his bill for an account against Newton, the respondent and only surviving executor who had acted.

Newton, by his answer, admitted that during Popham's life he had assisted him in writing letters to the co-executors in other islands, towards collecting the testator's assets, and it was proved that he had written, on behalf of himself and his co-executors, in Popham's lifetime, to a debtor at Demerara, requiring payment of a bond debt, but Newton insisted that this was no acting by him in Popham's lifetime. Newton also admitted that he had acted in Philips's lifetime, but alleged that he had left the testator's books in Philips's custody, and had not got possession of the deeds respecting one of the testator's mortgages (which was the principal charge against him) until after Philips's death, from which time he had been endeavouring to recover the debt without effect, and therefore was not liable to account to the appellant for the amount of it.

The defendant was decreed to account, and the Master, by his report, not having charged Newton with the full amount of the mortgage money, the appellant excepted to the Master's report, and his exceptions were allowed, and Newton was decreed to be liable.

1791.
ORR
v.
NEWTON.

Newton appealed from this decretal order.

Solicitor-General and Thompson, for the appellant.

Mansfield and *Abbot* for the respondent *Orr*, who insisted that Newton had acted *ab initio* by demanding *debts due to the testator even in *Popham's* lifetime. Y. B. 2 Ed. IV. s. 5, and was chargeable for default in not getting in the debts. *Lowson v. Copeland*, 2 Bro. Cha. Rep. 156.

[*275]

After argument the case stood over for judgment.

This day LORD CAMDEN gave judgment on the appeal :

We have taken time in this question, as the rule which affects the conduct of executors ought to be most seriously considered, because they make precedents in all Courts where the British law extends. And whatever we pronounce will become a general rule in the islands.

This case is a very extraordinary one ; it is a cruel prosecution, and a very severe decree has passed against the executor Newton.

In 1764 *Popham* proved the will, and none of the others seem to have proved ever since ; and *Popham* undertook to act solely, and did act solely until he died.

In 1766 upon *Popham's* death, *Philips* and *Newton* jointly acted, though neither proved ; but although both joined in acting, yet *Newton's* acting during *Philips's* life was somewhat singular and specific, namely, all the books and papers were left with *Philips*, who was a professional man, and when he did act it was only jointly with *Philips*, and under his advice ; and even then by the strictest rule *Newton* is not chargeable, except for his own acts personally, and not for those of his colleague.

In 1784, *Newton* surviving, acted alone.

These are the facts so far, and no act of receipt, payment, activity, or interference is proved against *Newton* during the life of

1791.
 ORR
 v.
 NEWTON.

Philips, and therefore his admission in his answer ties him up to nothing but what he has done separately and distinctly, and he only submits to account for his own single acts.

Newton then gets the books, &c. from Philips's executors; and from that time he did his utmost to possess himself of the testator's effects, and took the best advice to be had, as appears by the evidence.

[*276] When he got possession of the papers, he also got *four bonds for receiving the mortgage in question upon this appeal, and this was for 1,800*l.* secured on an estate in Nevis, and the bonds were for payment much about the times of the rent being due. The estate was in lease. Whether the rent was paid or the interest kept down (except that Newton says four of the bonds had been paid and accounted for), or how much interest would be covered by these payments, it is impossible now to tell, but on an account taken it would probably appear, that much was paid.

The bill brought by Mr. Orr, was not until 21 years after the testator's death; and the case is consequently full of obscurity; and after two legacies the residue was paid to those whom the plaintiff here represents.

Where neglect is the imputation made upon the defendant, some notice should be taken of the neglect on the part of the residuary legatees. The plaintiff living in Ireland, seems not to have known of it till many years after; but the legatees must and ought to have known of it.

If Popham's and Philips's executors had been brought before the Court, all the testator's estate would have been accounted for; and each might have been fixed with his own blame, instead of imputing blame to Newton only.

Upon this decree and report in the present case, exceptions were filed, and the main exception is now, whether Newton should be charged for neglect and wilful default to the amount of the whole mortgage money due at the testator's death.

The default imputed is the not calling in securities outstanding at the testator's death. Only one case has been cited, viz. *Lowson v. Copeland*, 2 Bro. 156, and even there it appears that the LORDS COMMISSIONERS and the LORD CHANCELLOR differed.

However it is an extraordinary case. And what is the

1791.
 ORR
 v.
 NEWTON.
 [*277]

executor to do? Is he to call in the securities before creditors require payment of their debts? Must the money lie dead without interest, or must he put it out on fresh *securities? On the original securities he had the testator's confidence for his sanction; but on any new securities it will be at his own peril.

He should not be required to call in the securities, until the creditors call for payment of their debts; or unless he has reason to suspect the solvency of the debtor; so where a simple contract debt is outstanding, an executor should not suffer the Statute of Limitations to accrue in bar of the demand.

But this was a mortgage, and how long it continued a good security is uncertain; perhaps many years after the testator's death, though ultimately it became deficient.

As to Mr. Newton, from the time he became active, by Mr. Stanley's evidence and the defendant's answer, he seems to have been more than ordinarily industrious, and there is no colour to charge him with fraud, dishonesty, or embezzlement.

From 1777 he gets into the hands of lawyers; and if asked my opinion of their advice, I must say, nothing was so ignorant and absurd; and if the lawyers were such, what must be expected of the laymen in the islands? and all this while, if the objection had been taken, the want of a probate in Mr. Newton would have been a bar to his recovering in any suit whatever. Here are several actions brought. A capture of the island intervenes. One bill is dismissed, and then on the last bill Newton obtains a sale of the mortgaged estates for 1,500*l*. If Mr. Orr himself, who bid at the sale, had kept his contract, the estate would have been sold for much more than it did at last; then the Master runs away, and only 500*l*. is left.

As the Court below, upon this case have charged Mr. Newton with the whole original mortgage money and interest, we cannot but think they have done wrong; and the exceptions to the report must be disallowed.

N.B.—There was a cross appeal argued the same day upon other exceptions, but the Court overruled them all.

1791.

*Dec. 3.**Rolls Court.*
ARDEN, M.R.

[285]

REED *v.* DEVAYNES.†

(2 Cox, 285—286.)

A legacy given to a man who is appointed executor. He must prove the will in order to entitle himself to the legacy, though not made a condition by the will. But he may prove at any time, even after the hearing.

ONE point in this case which now came on for further directions was whether the defendant Smith should have a legacy of 100*l.* left him by the will. It was given in these words. "I appoint Devaynes and Smith executors of my will, desiring them to accept of 100*l.* each, as a mark of my gratitude for the friendship they have shewn me." Smith, in his answer said, he had not proved the will, nor ever meant to prove it, but claimed the legacy. Upon the hearing he was advised, that he would not have the legacy unless he proved. Upon which he did prove the will between the time of the hearing and the setting down the cause for further directions. And his Honour now thought that he had sufficiently entitled himself; that the mere saying he never meant to prove the will was not a sufficient refusal to act while there was another executor acting. As to the interest it was waived. His Honour said, he thought in this case he might not be entitled to it after such a declaration in his answer, but said he would not lay down a general rule; for, said his Honour, suppose a child had a portion left him by a will, and was left executor, and did not act for some time, should he lose the interest.

Mitford :

Does your Honour think a child is in that predicament that, unless he acted in the executorship, he could not take a portion given him in the same will?

HIS HONOUR said, he did. As to other persons he said, he was quite clear; where the appointment is by one will, and the legacy by another, it may, perhaps, make a *difference; but wherever the appointment and the legacy are contained in the same will, the executor must prove, or he shall not have the legacy.

[*286]

† *Lewis v. Mathews* (1869), L. R. (C. A.) '91, 2 Ch. 261.
8 Eq. 277, 281; *Crawford v. Forshaw*,

[*Note.* Subsequent cases show that the testamentary expression of a motive, *e.g.* respect, gratitude, or friendship for the legatee, may exclude the general rule.—O. A. S.]

1791.
—
REED
r.
DEVAYNES.

EX PARTE AGACE.

EX PARTE TATE.

IN THE MATTER OF PROTHEBO AND SPRAGGON, BANKRUPTS.

(2 Cox, 312—318.)

In general, a partnership is bound by the acts of an individual partner in such cases only as in the usual course of dealing are referable to the partnership concerns.

1792.
July 28.
—
Lincoln's Inn
Hall.
Lords Com-
missioners
EYRE
and
ASHHURST, J.

THIS matter now came on upon a petition to confirm the certificate of the Commissioners, and also upon exceptions to the certificate.

[312]

Scollick, the brother-in-law of the bankrupt Prothero, *was indebted to William Owen in a sum of 500*l.* which was secured by the bond of Scollick, with a warrant of attorney to confess judgment. The bond was in the penalty of 2,000*l.* with a condition for the payment of 550*l.* due at the date of the bond, and any other sums or sum of money which Owen might advance to Scollick ; 50*l.* had since been paid, which reduced the debt to 500*l.*

[*313]

The latter end of December, 1789, Scollick applied to Prothero (who was then in partnership with Spraggon), to lend him 100*l.* which he did. Upon this application Scollick told Prothero of the debt which he owed to Owen, and the securities which Owen had ; and in consequence of what passed between Scollick and Prothero upon this occasion, they applied to Owen on the 24th December, and proposed to him that he should assign Scollick's bond to Prothero and Spraggon, and that he should take in lieu thereof five acceptances of Prothero and Spraggon for 100*l.* each, payable at 2, 3, 4, 5 and 6 months' dates. Owen agreed to this

1792.
 Ex parte
 AGAOE.

proposal, and in the evening of the same day he delivered up to Prothero Scollick's bond and warrant of attorney; and, at the same time, Prothero accepted five bills for 100*l.* each, in the names of himself and Spraggon, and delivered them to Owen. No assignment was then made of the bond, by reason that it was too late to get a stamp for the purpose; but on the 2nd day of January the assignment was executed. While Prothero was putting the names of himself and Spraggon to the five bills, Owen asked him whether Spraggon was acquainted with the transaction, and Prothero assured him that it was done with Spraggon's consent.

In fact, Spraggon was a total stranger to the transaction at the time, and was not acquainted with it until the 30th December, when he immediately expressed his disapprobation of it in the strongest terms, and insisted upon an immediate dissolution of the partnership between himself and Prothero.

[*314] On the 26th or 27th of December Scollick went to Chatham to collect some debts due to him, he being a bookseller, and previously to his going he selected a parcel of *books, of which he made an inventory, and authorised Prothero and Spraggon to dispose of them in order to reimburse themselves the 100*l.* which Prothero had lent Scollick; and the value of the books selected and comprised in the inventory were nearly of that value. But as soon as Spraggon was made acquainted with the transaction of the accepting the bills and the assignment of Owen's bond, he went down to Chatham after Scollick, and insisted upon a further authority from him to sell more of his stock, in order to indemnify Prothero and himself from the consequences of these acceptances, saying at the same time to Scollick, that he was determined not to be ruined by these bills. Scollick gave him some written order, the particulars of which did not appear. However Prothero and Spraggon appear immediately afterwards to have taken books of Scollick, to the amount of 500*l.* or 600*l.* At this time Scollick's circumstances were so bad that he was unable to return to London for fear of being arrested. On the 10th day of January following a public meeting of his creditors was called, and in the course of the same month a commission issued against him, and he was found bankrupt. The books

taken by Prothero and Spraggon were afterwards returned to Scollick's assignees.

Very soon afterwards a commission issued against Prothero and Spraggon, and they were found bankrupts. At the second meeting at Guildhall, the petitioner Mr. Agace offered to prove a debt of 500*l.* under the Commission, as indorsee of the five bills of exchange from Owen, and after a long inquiry and examination of the parties, the Commissioners admitted the proof against the joint estate of Prothero and Spraggon.

The assignees preferred their petition to the late Lord Chancellor, praying that this proof may be expunged, on the ground that these bills were accepted by Prothero without the knowledge of Spraggon, and in reality without any consideration, as Scollick's bond was good for nothing, he being at that time insolvent, and that at any rate this transaction was a fraud upon Spraggon. When the petition came on to be heard, Agace did not appear, *and thereupon his Lordship ordered the proof to be expunged.

1792.
Ex parte
AGACE.

[*315]

On the next day of petitions Agace preferred his petition, praying to have the former petition re-heard, upon an affidavit that it was owing to a mistake that he did not appear before to oppose it.

When this second petition come on to be heard, Lord THURLOW referred it to the Commissioners to inquire into and state to the Court the nature and circumstances of Agace's debt, and to state specially any circumstances that should be material for the information of the Court.

The Commissioners made their certificate, and after stating the manner in which the five bills came to Owen's hands, they found that Owen was indebted to Agace in 500*l.* for money lent; that on the 26th December Owen indorsed the bills and delivered them to Mr. Hammond (with whom Owen lived as a clerk or servant), for the use of Agace, in payment of the debt he owed him; that Hammond had formerly been in partnership with Agace, but was not at the time when Owen delivered the bills to him the general agent of Agace (and Agace admitted in his examination before the Commissioners, that he did not consider Hammond as his agent). It appeared further from the certi-

1792.
Ex parte
AGACE.

ificate, that Agace was first informed of this by Hammond, who went down to Agace's house in the country some few days after the bills were delivered to him by Owen, and that the bills were not actually delivered over by Hammond to Agace until the morning of the day when he offered to prove them under the Commission.

It appeared by the examination of Agace, that upon his return to London, about the 14th January, Prothero called upon him, and required him to return the five bills, alleging that no consideration had been received by himself and Spraggon for them; whereupon Agace declared he was a total stranger to the transaction, and declined to give Prothero any answer until he had consulted Owen upon the subject.

[*316] The two first exceptions taken by the assignees to the certificate of the Commission were in respect of facts *certified by them, which the assignees insisted were not supported by any evidence; but the third exception was, for that the Commissioners had not certified that before the bills came to the hands of Agace, Prothero informed him that the bills had been obtained without any consideration (according to the admission of Agace in his examination); which fact the assignees insisted ought to have been certified as a fact "material for the information of the Court."

When the exceptions came on to be heard Lord Commissioner EYRE immediately declared that this third exception appeared to him to be so material, that he thought the certificate ought to be set right in that particular before the question could be argued, as in all events it would form a very material circumstance in this case.

Whereupon the counsel for Agace agreed that Agace must be considered as having had notice of the circumstances under which the bills were given, at the time he became the holder of them, and that he therefore could not stand in any better situation than Owen himself would have done, if he had proved the amount of the bills under the Commission.

The Court then heard all the examinations which were taken before the Commissioners, and the matter was fully argued as well on the exceptions as the certificate itself.

LORD COMMISSIONER EYRE :

1792.

Ex parte
AGACK.

[316]

It is now rightly understood, that the real question in this matter is, whether Owen could have proved these bills under the Commission against the joint estate of Prothero and Spraggon.

In partnerships both parties are authorised to treat for each other in everything that concerns, or properly belongs to the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case.

On the other hand, if the transaction has no apparent relation to the partnership, then the presumption is the other way, and the partnership will not be bound by the acts of one of the partners without special circumstances.

The case of Fordyce (which has been mentioned) *illustrates these principles, for the circumstances of that transaction were such as were naturally connected with the banking-house in which Fordyce was a partner; but the thing which turned that case was, that the parties with whom he dealt expressly desired to know whether the partnership consented to the transaction, which shewed they did not rely upon the common law on the subject. Fordyce assured them of the consent of the partnership, and they relied on that assurance. If they thought the express guarantee of the house necessary, they should not have taken Fordyce's word only for it.

[*317]

Here the debt due from Scollick to Owen had nothing to do with the partnership of Prothero and Spraggon; and at the time the bills were given, Owen himself asked Prothero the question, whether Spraggon knew of it, and he took Prothero's word for this, as in the other case the parties took Fordyce's.

I am perfectly satisfied that this was a transaction with an individual partner in a matter not relating to the partnership, and that therefore the partnership could not be bound by it without their subsequent concurrence.

But then it has been argued that Spraggon ratified this transaction by his subsequent conduct in insisting upon a security from Scollick to indemnify the partnership against the consequences. But how does this stand? He was informed

1792.
Ex parte
AGACE.

generally of the transaction, and immediately expressed the strongest dissatisfaction, and insisted upon a dissolution of the partnership; but not knowing (perhaps) the legal consequence of what had been done, he apprehends that by some possibility he may be involved in it, and that if he was so, he should be ruined. He was therefore anxious to get goods from Scollick into his hands for fear of accidents. I cannot think this a ratification of what Prothero had done. Then it has been said that Spraggon ought to have given notice to Owen immediately of his disapprobation; but it by no means appears that he knew he could do any good by giving such notice, nor in fact would it have varied the case from what it now is under the events that have happened.

[*318] *LORD COMMISSIONER ASHHURST :

One partner is bound by the acts of his co-partner in all acts referable to the partnership trade, but where a man takes a security from one partner in the name of the partnership in a transaction not in the usual course of dealing, he takes such a security at his peril. Here Scollick was the brother-in-law of Prothero. Prothero applies to Owen to relieve Scollick from the pressure of the securities; Owen looks upon this so far out of the usual course of dealing, that he makes particular inquiry whether Spraggon knew of it. If he had any doubt on this head, he ought to have applied to Spraggon himself. This therefore is a transaction by which the partnership is not bound. The next question is, whether by anything subsequent to the transaction itself Spraggon has made himself liable, that is, by any actual ratification, or any neglect in not giving proper notice. As to notice, even if it had been at all material, you cannot expect a man to deal at the first moment after an event of this sort in the same manner, as a lawyer might advise him to do. And as to his conduct with Scollick about the books, I think, for the reasons given by my lord Commissioner EYRE no stress can be laid upon it.

The COURT therefore ordered that the petition of Agace should be dismissed, and Lord THURLOW's original order should stand.

FOX *v.* MACKRETH.

PITT *v.* MACKRETH.

(2 Cox, 320—339.)

[The case and arguments (shortened) are from 2 Br. C. C. 400—420.]

A trustee for the sale of estates for payment of debts, who purchased them himself, by taking undue advantage of the confidence reposed in him by the plaintiff, and previous to the completion of the contract, sold them at a highly advanced price; decreed to be a trustee for the original vendor as to the sums produced by such second sale.

THIS cause came on by appeal from the Rolls.

The original bill was filed in 1781, by the plaintiff, James Fox, Esq. against Robert Mackreth, John Dawes, and John Baynes Garforth, Esqrs. The supplemental bill was by William Morton Pitt, Esq. and James Farrer, trustees of the estate and effects of James Fox, against the same defendants, to have the benefit of the former suit.

The material part of the prayer of the original bill was, that the sale of the plaintiff's estates in the county of Surrey, made to Thomas Page, Esq. might be declared to have been made in trust for the plaintiff, and that Mackreth and Dawes might be declared to be accountable to the plaintiff for what the estates were sold for to Page; and also for accounts of what was due to the defendants Mackreth and Dawes, and upon what securities; and that they might be decreed to deliver up the securities, the plaintiff offering that they should be at liberty to retain, respectively out of the purchase-monies of the estates, what should be found justly due to them from the plaintiff, and an account of monies due to the defendants, on account of annuities granted by the plaintiff to the defendants, the plaintiff offering that the defendants should be at liberty to retain the sum found due out of the said purchase-monies.

*The circumstances of the case made against the principal defendants, Mackreth and Dawes, as taken from the bill, answer, and evidence, appear to be these.

That the plaintiff Fox, being seised in tail of an estate at Horsley and elsewhere, in the county of Surrey, subject to an

1788.

In Chancery.

THURLOW,
L.C.

March, 1791.

*House of
Lords.*

[320]

[2 Br. C. C.
400.]

[*401]

1788.

Fox

v.

MACKRETH.

estate for life, in some parts thereof, to his mother for her jointure in lieu of dower, and likewise seised or possessed of copyhold and leasehold estates in the same county, and also entitled to several other estates in expectancy or for life only, had before he came of age embarked in a very expensive course of life, and was reduced to great distresses, and, under these circumstances had procured money by granting annuities, and engaging his friends who were of age, in bonds and judgments, for securing the payment of them, that his friends being acquainted with his situation, proposed that, as soon as might be after he should attain his age of 21 years, he should suffer a recovery of the Surrey estate, which, or a competent part thereof, should be conveyed to trustees to be sold for the payment of his debts, and redeeming the annuities for which he, and his friends on his behalf, had engaged; that he attained his age of 21 in the month of August, 1777, and was very soon afterwards (in the latter end of that or beginning of the next month) introduced to the defendant Mackreth, (who usually supplied young men of fortune with money in their distresses,) and, on account of the plaintiff's inability to make a security by mortgage, as a recovery could not be suffered till Michaelmas term, it was agreed, that the defendants, Mackreth and Dawes, should supply the plaintiff with the sum of 5,100*l.* upon the plaintiff's granting two annuities of 500*l.* and 350*l.* each for his life. That Dawes, on the 23rd of September advanced the 5,100*l.* for which the following securities were executed. A bond of that date by the plaintiff, in the penal sum of 6,000*l.* for securing to the defendant Dawes an annuity of 500*l.* for the life of the plaintiff, a warrant of attorney of even date to confess judgment on the said bond, and an indenture *tripartite*, between the plaintiff of the 1st part, Dawes of the 2nd part, and Garforth of the 3rd part, whereby lands in the county of York of which the plaintiff was seised for life were conveyed to Garforth, for securing the payment of the annuity of 500*l.* to Dawes. The annuity of 350*l.* was secured by a similar bond of the same date, warrant of attorney to confess judgment thereon, and a similar conveyance of the same lands to Garforth, *for better securing the same. In the annuity of 500*l.* Mackreth, in

his answer, admitted he was interested with Dawes, but denied that he was so in that of 350*l*. In Michaelmas Term, 1777, a recovery was suffered of the freehold part of the Surrey estates, by which they were vested (subject to the mother's estate for life in a part thereof) in Oliver Farrer, in trust to convey the same in such manner as the plaintiff should direct. Mr. Farrer, having agreed to act as a trustee for the purpose of selling the same and discharging the debts, together with, and under the direction of two of the plaintiff's friends, (which appear to have been Lord Ligonier and Lord Grantley), if they could be prevailed upon to accept the trust. In December, 1777, the plaintiff being threatened with an arrest for the sum of 2,000*l*. by the holder of bills of exchange drawn by the plaintiff while at Paris, applied to the defendant Mackreth who agreed to lend the plaintiff 3,000*l*. on mortgage of the Surrey estates; upon which mortgage deeds, dated 22nd and 23rd of this month, were accordingly prepared and executed. At the time of the execution of these deeds, it was proposed that defendant Mackreth should be a trustee with Farrer, for payment of the debts and redeeming the annuities, when the defendant Mackreth proposed the defendant Dawes for that purpose, as being, from the course of his business, well acquainted with many of the persons who had purchased the plaintiff's other annuities, and could assist in purchasing them at a cheaper rate than Mr. Farrer; which was assented to by the plaintiff, upon an assurance that nothing should be done without Mr. Farrer being consulted, and approving thereof. In the same month the plaintiff delivered to the defendant Mackreth a particular or rental of the estate in Surrey, made by Thomas Jackman, by which it appeared, that the rents of the houses, and cottages on the premises, amounted to 283*l*. 1*s*. and those of the lands to 979*l*. 14*s*. (subject to the mother's jointure, which was stated at 240*l*. a year), and the timber was valued in the rental at 4,000*l*., and the whole was valued at 45,000*l*. It was also in evidence, that Mackreth sent down a man, of the name of Hampton, to view the estate, who was there a week, but what valuation he made, or whether the same was communicated to Mackreth did not appear. A trust deed was prepared by Garforth, reciting

1788.
FOX
v.
 MACKRETH.

1788.
 Fox
 v.
 MACKRETH.
 [*403]

the mortgage, by which the estates were conveyed to Mackreth and Dawes, (subject to Mackreth's mortgage and the annuity to *Dawes), in trust to sell or mortgage the same, and to pay the debts and redeem the annuities granted by the plaintiff. These deeds being sent to Mr. Farrer, he made some objections thereto, on account of the sums advanced as the prices of the annuities not being scheduled as gross sums carrying interest at 5 per cent., and also on account of the trustees being empowered to sell or mortgage the estates without the intervention of Mr. Fox. And it being afterwards agreed, that Mackreth should pay off Dawes, and advance some further sums, a deed poll was prepared, calculated for execution on the 16th January, 1778, and endorsed on the mortgage deed, to secure such further sum of 7,000*l.*, consisting of 5,100*l.* the consideration money for the annuities granted by the plaintiff to Dawes, with 212*l.* 10*s.* interest thereon, for the quarter's arrear due 23rd December, 1777, (but which was not paid by Mackreth to Dawes until 16th July, 1778) and 51*l.* 14*s.* 9½*d.* 23 days' arrear of the said annuities from 23rd December to said 16th January, and 1,635*l.* 15*s.* 2½*d.* paid to the plaintiff on that 16th January, 1778, a new trust deed was also prepared, in which this deed poll was recited, and the 3,000*l.* and 7,000*l.* made the first charges on the estates. On the 16th January, 1778, the plaintiff Fox and the defendant Mackreth dined together at the house of the defendant Garforth, for the purpose of executing these deeds, and, after dinner, and before the plaintiff had executed the deeds, a conversation arose, in which it was proposed that the defendant Mackreth should become the purchaser of the estate, and Jackman's valuation of 45,000*l.* was mentioned by the plaintiff as a fair price, which was objected to by Mackreth, considering the value put thereby upon the houses and lands; upon which the defendant made a calculation of the houses at fourteen years' purchase, and the lands at thirty, together with the household furniture, valued at 500*l.* and the timber at 4,000*l.* (on which last two articles they agreed) amounting to 37,853*l.* 14*s.*; the plaintiff afterwards offered to sell the estates to the defendant for forty-two thousand pounds, upon which the defendant said, he would split the difference, and give 39,500*l.* for the same, but

would not give more, and the plaintiff not agreeing to accept the terms, the trust deeds were then executed by the plaintiff. After the deeds were executed the conversation was renewed, and the plaintiff expressing some concern with respect to his mother's jointure, in case he should accept *the defendant's terms, the defendant offered the 39,500*l.* and to subject himself to the payment of the plaintiff's mother's jointure, in case she should survive him ; upon which the parties agreed, and the defendant Garforth (who had been absent during the greatest part of the treaty) was called in, and drew up a memorandum of such agreement, by which the money was to be paid on or before the 25th of March next, till which time the plaintiff was to receive the rents and profits, and then convey the estate to the plaintiff, and about 12 o'clock at night, this memorandum was signed by the plaintiff, upon which the trust deed was cancelled. On the 28th of the same month, articles for the purchase were executed by both parties. On the 24th April following, the plaintiff, and Anna Fox, his mother, on the 2nd of May, executed conveyances of the estates to the defendant, in consideration of 39,500*l.* ; 11,097*l.* of which was retained by the defendant, in payment of the above mortgage of 3,000*l.* the 7,000*l.* secured by the deed poll, and some other sums charged by the defendant, as advanced to the plaintiff, and the defendant gave the plaintiff, as a security for the residue, being 28,403*l.* a common accountable receipt ; and afterwards, on the objection of the plaintiff to this as the only security for the money, the defendant wrote on the same piece of paper, which contained the said accountable receipt, the following charge ; " 25th April, 1773, I do hereby charge all my estates in the county of Surrey, with the payment of the above sum of 28,403*l.* and interest." At the time of signing the above, the defendant had no estates in the county of Surrey, but those purchased by him of the plaintiff. And the defendant gave to the plaintiff no other security for the residue of the money than the receipt and charge. In the interval between the execution of the articles and that of the conveyances, Mackreth had treated with Thomas Page, Esq. for the sale of the whole of the said estate, and on the 21st March, Mr. Page agreed to give 50,500*l.* for the same, but no article was

1788.
Fox
v.
MACKRETH.

[*404]

1788.
 Fox
 v.
 MACKRETH.

[*405]

entered into between him and the defendant till the 30th April following. Immediately after, Page was let into possession, and was to receive the rents and profits from Lady-day then last. The treaty with Page, was totally unknown to the plaintiff, when he executed the conveyance to the defendant. The plaintiff drew upon the defendant for several sums, on account of the purchase-money, and in October, 1778, having sent for an account, the defendant drew one out by which he made a balance remaining in his *hands of 778*l.* 18*s.* 9*d.*, but admitted in his answer that he had therein charged monies unpaid, as the supposed amount of two annuities, and the arrears thereof then unredeemed, and that afterwards, in May, 1781, having then settled the said annuities, he sent the plaintiff another account, in which he made the balance 616*l.* 17*s.* above the other balance of 778*l.* 18*s.* 9*d.* In June, 1779, the plaintiff being again in distress, applied to the defendant, when he advanced him 2,100*l.* upon an annuity of 350*l.* a-year, for plaintiff's life, secured by a bond, in the penal sum of 4,200*l.* and warrant of attorney to enter up judgment on the same.

Upon discovery of the sale to Page, under the circumstances as stated above, the plaintiff filed his bill, insisting that the defendant Mackreth being a trustee for him under the trust deed for payment of debts, it was his duty to sell the same for the advantage of the plaintiff; and if he purchased for himself (which the plaintiff was advised he could not), it should be for a fair and adequate consideration; that the plaintiff having been imposed upon, ought to have the benefit of the sale; and that the sum of 7,000*l.* mentioned in the articles as due to Mackreth, on mortgage, or the part thereof estimated to be due to the defendant as the value of the annuities granted to Dawes, was a much greater sum than they were really worth on a fair valuation; that no greater allowance ought to be made out of the purchase-money than the sums really advanced, with interest from the time of advancing the same; that Mackreth had not discharged the annuities granted by the plaintiff, but the plaintiff continued liable to the same; and that at the time he granted the last annuity of 350*l.* there was money in the defendant's hands, or the defendant was accountable to the plaintiff for larger sums, as he then had in his

hands the sums for which he sold the plaintiff's estate, beyond the sum of 39,500*l.* and therefore prayed as is before stated.

1788.
FOX
v.
MACKRETH.

The defendant, Mackreth, by his answer, insisted on the fairness of the transaction; and that the price at which he bought the estate was an adequate price, though he expected to have some benefit by selling it out in parcels, but that the purchaser, Mr. Page, having an estate in the neighbourhood, gave a larger price than it was worth to other persons. He admitted that he *had in his hands a balance of 61*l.* 18*s.* of the purchase-money, which he claimed to retain on account of the plaintiff being only tenant for life in a small part of the estate conveyed to the defendant, and 77*l.* 18*s.* 9*d.* the balance of the accounts sent to the plaintiff in October, 1778; and further said, that on the 30th August, 1779, part of the estate being discovered to be copyhold, the defendant applied to the plaintiff to execute a letter of attorney, to surrender such copyhold premises to the defendant, which he readily agreed to, and signed such letter of attorney; and that Mr. Page, the purchaser, in November, 1779, having raised a sum of money by mortgage of part of the said estates, and afterwards having occasion to raise money by mortgage of other parts of the said estates, and the solicitor for the person advancing the money requiring to have the original deeds of the 22nd and 23rd December, 1777, and the conveyance from the plaintiff to the defendant, or duplicates thereof, the defendant applied to the plaintiff to execute other parts of the deeds, which he agreed to, and, together with his mother, executed the same without expressing himself dissatisfied with the purchase made by the defendant (but it was in evidence that Mr. Farrer only consented to the plaintiff's executing the same, under a proviso that the same should not be considered as a confirmation), which acts of the plaintiff the defendant insisted would operate as confirmations of the transactions.

[*406]

The cause was heard at the Rolls, before his Honour the then Master of the Rolls,† on the 26th, 27th, and 29th of June, and on the [4th,] 13th, 14th, and 26th of July, 1786, on which last day his Honour was pleased to make his decree, whereby he declared

† Sir Lloyd Kenyon.

1788.
 Fox
 v.
 MACKRETH.

[*407]

that undue advantage was taken by the defendant, Mackreth, of the confidence reposed in him by the plaintiff, Fox, and that therefore the defendant, Mackreth, ought to be considered as a trustee as to all the estates and interests comprised in the conveyance of the 23rd and 24th days of April, 1778, for the said plaintiff, Fox, after the execution of the said deeds; and ordered it to be referred to the Master to take an account of the money received by the defendant, Mackreth, from Page, and to compute interest thereon at 5l. per cent. from the time of receiving the same, and to take an account of the money paid by defendant, Mackreth, to Dawes, on account of the annuities of 500l. and 850l. and also an account of the money advanced by Mackreth, *on account of the annuity of 850l. in 1779,† and an account of money advanced or paid by Mackreth, on account of the mortgage in 1778, and under the contract for the purchase of the estate,‡ and compute interest on the same, and that the defendant Mackreth should pay the plaintiff the costs of the suit, so far as respected his insisting on the conveyance of the 23rd and 24th April, 1778, as a conveyance for his own benefit, and granted an injunction against the defendant Mackreth, to restrain him from proceeding at law, touching any matter in question in the cause, and reserved further consideration.

From this decree there was an appeal by the defendant, Mackreth, only, to the Lord Chancellor, which came on to be heard in Michaelmas Term, 1787, when *Mr. Mansfield*, *Mr. Scott*, *Mr. Lloyd*, *Mr. Campbell*, and *Mr. Mitford*, were heard for the respondents, in support of his Honour's decree.

[*408]

**Mr. Ambler*, *Mr. Madocks*, *Mr. Selwyn*, *Mr. Ainge*, and *Mr. Hargrave*, for the defendant and appellant Mackreth :

[*410]

*We contend, 1st, That there was no confidence reposed by Fox in Mackreth. 2ndly, Whether there was a confidence reposed or not, there was no abuse of it. 3rdly, That neither the declara-

[*411]

tion, facts, or circumstances support the directions. *Mackreth

† "And the particular times when, and in what manner, such sums were advanced."—Reg. Lib.

‡ "Or the conveyance thereof, and

to state the particular times when, and to whom such sums were paid, and the account in which the same were included respectively."—Reg. Lib.

had no dealings with Mr. Fox during his minority, he did not even know him at that time. The first application to Mackreth was from Garforth, to buy an annuity; Garforth was connected with Fox, for the purpose of borrowing money. *With respect to consulting Farrer, that was not Mackreth's business, if Fox did not choose so to do. If it was anybody's business to advise Fox it was rather Farrer's than Mackreth's. *Then, as to the sale itself, on the 16th of January, Fox and Mackreth treat on the subject, Mackreth offered 87,000*l.* at last 89,000*l.* including the furniture, and securing Mrs. Fox's (the mother's) jointure. This agreement was put into writing by Garforth; no objection is made to the form of the writing. On the 28th January the contract was signed by Fox and Mackreth. The conveyance was laid before Farrer, and executed 24th April, so that it was incomplete from January to April. The objection now taken and relied upon, is that Mackreth was a trustee, and therefore could not contract for the purchase of the estate; but we deny that he was a trustee, and even though he were so, he might purchase upon fair terms. They contend on the other side, that the trust deed was executed, and Mackreth bound not to contract with his *cestui que trust*. It is true it was executed by Fox; for during the conversation about the purchase, Fox not agreeing to sell at the price then offered by Mackreth, executed the trust *deed, but continued the conversation relative to the purchase, the trust deed lying all the while upon the table. If the conversation had ceased, the deed would have had effect; as it was, it was a nullity; then how can it operate as a trust? It was a trust intended, if they will, commenced, but in the same moment put an end to, never acted under, but broke off immediately. But even supposing him to be a trustee, he might contract for the estate, so that he did but deal fairly. We admit that a trustee cannot purchase for his own benefit. If, as a trustee, he had conveyed to a third person as a trustee for himself, that would be void, but there is no case which has decided that the *cestui que trust* cannot sell to his trustee. *Farrer not being present at the final agreement, is the next head of objection. But if Mr. Fox did not choose to have him present, it could not be incumbent on Mackreth to send for him; besides, the draft of the

1788.
Fox
v.
MACKRETH.
[*412]

[*413]

[*414]

[*415]

1788.

Fox

c.

MACKRETH.

[*416]

conveyance was sent to him, and if the price was not adequate to the value, or there was anything wrong in the contract, Farrer should have objected to it, and have advised Fox not to proceed; on the contrary, it appears by his letter of the 7th April, 1788, that he approved of the conveyance, except that he objected, in some respects, to the mode, and to the money remaining in the hands of Mackreth for payment of Fox's debts; but to the purchase itself, Farrer never objected. The real cause of the suit is, that Mr. Page has given 50,000*l.* for the estate. Mr. Fox rested *under the sale, till 1781, when that sale was discovered, but an advanced price being afterwards obtained, is no reason for setting aside a previous fair sale of lands; to assert that it is would be too much where there is no fraud. The price of 50,000*l.* paid by Page, was, in fact, a *pretium affectionis*; it was 6,000*l.* more than Jackman had valued it at, or Fox ever thought of getting for it.

Mr. Mansfield in reply :

[*417]

It is not to be denied that the large price at which the estate has been sold to Mr. Page is the cause of the present suit. It is that advance of price which affords the strongest evidence of the purchase by Mackreth being fraudulent. *The Master of the Rolls has founded his decree in a confidence reposed by Fox in Mackreth. The question is only as to the inference to be drawn from the facts. In order to make out the confidence reposed by Fox in Mackreth, a few circumstances are to be attended to. Mr. Fox came of age in August, 1777: very soon after that, in September, 1777, the connection between him and Mackreth began; the first step was the purchase of two annuities, at six years' purchase; then the loan of 3,000*l.* on mortgage of the Surrey estate. Then Mackreth engages to become a trustee, to sell the estate for payment of debts, apparently with no other intention than to relieve Fox's necessities. On the 16th of January they met to execute the trust deed, but the meeting terminated in the agreement for the sale of the estate. On the 24th of April there is a conveyance of the estate, and Fox has nothing to show for the balance of 28,000*l.* but Mackreth's accountable receipt and charge of the money on the Surrey estates. On the 21st of March, Mackreth had sold the estate to

Page for 50,000*l.*; towards the close of 1778, he had lent Fox 1,000*l.*; in June, 1779, there was a treaty for an annuity, part of the consideration of which was to be the 1,000*l.* The account made up in 1778, is agreed on all hands to be a false one. In June, 1779, another account was made up, then Mackreth applied for duplicates of the conveyances, which Fox complied with. These are the material facts from which it is impossible to doubt that the fullest confidence was reposed by Fox in Mackreth, and that Mackreth did, on the 16th of January, take an undue advantage of that confidence. On the 16th of January, every transaction of the day shews that Mackreth represented himself as Fox's friend. The account given by Mackreth, in his answer relative to the loan of 3,000*l.* and the annuity, is contradicted by the evidence; a full confidence is not to be expected to an answer in general, which is proved false in any particular. Suppose it to be true that the proposal for the sale came, on the 16th of January, from Fox, how easy was it for Mackreth to suggest that an immediate sale would be better than entering into a trust deed, and to make the formal proposal come from Fox, though the suggestion was his own: but be this as it may, no just inference is to be drawn from it to the merits of the cause. Fox entered into *the contract with Jackman's valuation in his hand, and at twelve o'clock at night drops his price to 39,000*l.*; how is this to be accounted for, but by his confidence in Mackreth? If the sale had been fair and open, I should be precluded from these observations: but there never was a contract which was more suspicious from the characters of the parties concerned. The counsel on the other side have said, that when they were treating for the sale, the confidence was over, and that they were in a market; but it is impossible a sale should be negociated under circumstances more private. It is as near the case of a trustee selling to himself as can possibly be, but still it shews what opinion Fox had of Mackreth; it is highly probable that the latter had the sale in his contemplation when he made the appointment: this is rendered probable by his having a valuation. *The whole transaction speaks the truth of the Master of the Rolls's declaration, that there was a confidence reposed in Mackreth; and it will need very little argument to prove that

1788.
Fox
v.
MACKRETH.

[*418]

[*419]

1788.
Fox
 v.
 MACKRETH.

[*2 Br. C. C.
 420]

that confidence was abused. Either Mackreth had a valuation at the time of the treaty or not; if he had not, he induced Fox to sell at 7,000*l.* less than his own valuation; if he had, he concealed that circumstance from Fox, and now conceals it from the Court. It is urged that this transaction cannot be set aside, because, if it is, no man can purchase at a fair price, *and sell at a greater, without the fear of having the transaction rescinded. But was there ever a fair case where such an advantage was made as in the present? No man acting fairly would deal with a young man without witnesses; no man acting fairly would conceal his having a valuation. It is to be hoped such a transaction will never exist again; but no fear can arise to fair transactions, from such a transaction as this being overturned.

[*32] *LORD CHANCELLOR :

[321]

The great and only doubt which I have had from the beginning to the end of this case is whether the ground upon which I must go, if I affirm this decree, will not by necessary implication extend to many other cases, in which I shall run the hazard of undoing all the common transactions of mankind, and of rendering all their dealings too insecure. I do not agree with those who *say, that wherever such an advantage has been taken in the course of a contract by one party over another, as a man of delicacy would refuse to take, such a contract shall be set aside. Let us put this case. Suppose A., knowing of a mine on the estate of B., and knowing at the same time that B. was ignorant of it, should treat and contract with B. for the purchase of that estate at only half its real value, can a Court of Equity set aside this bargain? No; but why is it impossible? not because the one party is not aware of the unreasonable advantage taken by the other of this knowledge, but because there is no contract existing between them by which the one party is bound to disclose to the other the circumstances which have come within his knowledge; for if it were otherwise, such a principle must extend to every case in which the buyer of an estate happened to have a clearer discernment of its real value than the seller. It is therefore not only necessary that great advantage should be taken in such a

contract, and that such an advantage should arise from a superiority of skill or information ; but it is also necessary to shew some obligation binding the party to make such a disclosure. Therefore the question is, not whether the transaction be such as a man of honour would disclaim and disdain, but it must fall within some settled definition of wrong recognized by this Court ; for otherwise the general transactions of mankind would be too much in hazard and uncertainty. In this view, and in this view only, I have entertained considerable doubts on this case. The MASTER OF THE ROLLS has referred a great variety of accounts subsisting between the parties to the Master, and it is not quite a fair argument to consider this part of the case as altogether decided : if these points are material, the only consequence is, that as to them the judgment must be suspended. In the present appeal I shall consider the case entirely on the transaction of the 16th January ; I shall also consider certain terms necessary to be found in analogy to the finding of a Jury. First, it is necessary to find the real value to be what Page gave for the estate, or much more at least than the price given by Mackreth ; for unless there be great inadequacy of value, the case comes *to nothing ; the fraud or imposition of the one party affords no ground of relief, unless damage be sustained by the other ; and on the other hand it does not follow, though the real value should be found such as now represented on the part of the plaintiffs, that it will put an end to the contract, unless such advantage has been obtained by some of those frauds which the policy of this Court has adopted as grounds on which to set contracts aside. The MASTER OF THE ROLLS has said that Mackreth shall be a trustee ; and so he must be taken consequentially ; for if it be true that Mackreth has cheated Fox in this bargain, he did get the estate at law, but he did not get the estate in equity, and then he is reduced to a trustee ; it is only in consequence of his getting the estate by fraud, that he becomes a trustee. Suppose an estate to be of the value of 50,000*l.* and Mackreth buys it for 40,000*l.*, committing great fraud in such purchase ; but from the calamities of war and other public distresses, landed property as well as stocks, sink in value more than one-fifth, and Mackreth then sells the estate for 35,000*l.* or

1788.

FOX

v.

MACKRETH.

[*322]

1788.
 Fox
 v.
 MACKRETH.

30,000*l.* only, would it not be true that Mackreth would be bound to pay the 10,000*l.* as a satisfaction for the fraud committed by him, although he had not made the money he actually gave for it? the money would be due, not in consequence of what Mackreth afterwards sold it for, but what Fox lost by it at the time. The only consequence in a Court of Equity is, that what one party lost by the undue advantage taken by the other, must be answered to him. The MASTER OF THE ROLLS went on the fact of the value of the estate being that for which it was sold to Page; and thought that this being the value, Mackreth had cheated Fox. Taking this for the present to be so, let us go over shortly the facts of the case. Fox began to be distressed about three or four years before he came of age; he had engaged other young men, with whom he was connected, to become securities for him for sums of money he had borrowed; he had involved himself in annuities. When he came of age, he found himself under this imperfect obligation in point of law, but very strong obligation in point of honour, to relieve those who *had pledged their names for him. A plan was formed to sell a part of his estate. His situation as to fortune, when he came of age, was this: his estate in Surrey was about 1,200*l.* per annum; of this he was tenant in tail. He had an estate in Yorkshire of 1,100*l.* per annum of which he was tenant for life. He had also an estate in Ireland of which he was tenant for life in possession, of about 5,000*l.* or 6,000*l.* per annum. Such was his situation when he came of age. He had resorted to a man of character in his profession, Mr. Farrer, for the purpose of settling this business. The 23rd August, 1777, came, and no step was taken towards taking any account of his debts and annuities, or negotiating with any of his creditors; yet it is most evident that the best time for settling these matters with his creditors, was before he came of age. However, he came of age on 23rd August, and on 23rd September, it seems the first conversation was had upon this subject. He had then been introduced to Mackreth. At that time certainly there was nothing confidential in their intercourse, or any close connection, between them; but Fox applied to Mackreth for about 5,000*l.* Mackreth naturally asked what security he had to offer. Fox

[*323]

thereupon told him his real situation, by which it appeared that Fox had no permanent security to offer till Michaelmas Term, when he could suffer a recovery of the Surrey estate. Mackreth then proposed to him, as the ordinary mode of raising money, to buy an annuity of him at six years purchase, which is in truth about half the real value; and therefore whoever proposes to deal with another upon this sort of terms, quits at once all idea of delicacy, or generosity, or propriety of conduct; it is such as cannot be endured out of a Court of Justice; and if a Court does affirm such transactions, it cannot be the heart of a Judge which affirms it, but it must be done from a fear of laying down such rules as may tend to make the general transactions of mankind too insecure. There were other modes which might have occurred to a man of different feelings. A contract to make a mortgage when the term came, would have been an effective lien on the estate; and then it would only *have been necessary to have insured Fox's life to the end of Michaelmas Term. This would have been the just and honourable way of relieving him. On the other hand it is observable, that though Mackreth adopted the other mode of raising the money, it was done in the usual course of his business; for by profession, he dealt in the distresses of mankind. What he did, he did in his way and business of an annuity-monger. I make neither better or worse of his conduct, than that of a common and professed annuity-monger. In November the recovery was suffered. Still nothing was done by Fox's friends towards relieving him from the annuities which were eating him up. On the 24th December Fox sent word that he was in great distress, in confinement, and wanted money immediately. Mackreth came to him and lent him money on common terms, and took a mortgage for it. A Judge cannot impute anything to this part of the transaction either one way or another. There was no generosity on one side, nor any plot of circumvention on the other. It would be a most extravagant conjecture to suppose that by this Mackreth had in view to get the legal estate in himself. When one once gets beyond the natural result of facts there is no end to conjecture or its consequences. This was the situation on the 24th. Mackreth was made acquainted

1788.
Fox
 v.
 MACKRETH.

[*324]

1788.

FOX

v.

MACKRETH.

[*325]

with the plan of the trust deed, and it is certain that he industriously recommended himself and Dawes as trustees for this purpose. It has been said that Mackreth's forcing himself into the trust, was improper, and done from some bad motive, and that taking the business out of the hands of Mr. Farrer, was calculated to give Fox a bad impression of him. I do not agree to this. In whose room were Mackreth and Dawes to be substituted? The two first were Lord Grantley and Lord Ligonier, who were put in only because they were Lords, I believe; for it was not very probable that they should be active or attentive in executing such a trust as this. As to Mr. Farrer himself, it is only to be said, that he had in fact done nothing in the affairs, nor taken any steps towards it. I therefore really believe that Mackreth meant what he said upon that *occasion, and when he proposed himself and Dawes as trustees, he meant to transact the business to the best advantage. In doing this he undertook a very delicate trust: first he was to make the most of the estate; then to deal with the several annuitants: this put him into very awkward circumstances, himself and Dawes being both considerable annuitants, and therefore when he undertook to deal with the annuitants at large he undertook a very nice charge, and it was incumbent on him to see with very great attention that he did not shew more favour to the annuitants than he ought to do. I certainly do not approve of Mackreth's conduct, when, after having recommended himself as a trustee for these purposes, he allowed the several annuities to stand as far as they had then gone, redeeming them only from that time. However, in fact, he bought the annuities on the behalf of Fox, though with his own money; but instead of considering them as discharged on the 24th of December, when he bought them, he considered them as bought for his own use, and treated them as existing annuities. Here therefore he has gone beyond the line of delicacy; for this is a transaction that a Court of Equity will never permit to stand. Here the Court will say he took an undue advantage of his situation. Yet it seems as if he thought this a fair mode of dealing in this sort of market. In another instance he charged Fox more than he actually gave for the redemption of an annuity, and this part of the transaction must of necessity be

1788.
Fox
 v.
 MACKRETH.

rescinded, as Mackreth has acted unfairly in it; and Fox has the advantage of finding that Mackreth after having recommended himself as a trustee, and undertaken to act faithfully for his *cestui que trust*, has yet been dealing unfairly in this very article. On the 16th January it is allowed that Mackreth was the trustee of Fox, and whatever consequences arise from this character must belong to him : considering him therefore as a trustee, see what was done ; first he sent down a surveyor to the estate ; but he has so *managed this part of the case as to prevent the Court from seeing much into it. The Court will act temperately in its conjectures on this, but at the same time will impute all that it fairly can in point of suspicion. On one side it is said that Hampton was sent down to survey the estate with a view of enabling Mackreth to make the greatest advantage of it for his private benefit ; but I do not think so. I think it ought to be taken, that he had the estate surveyed as a trustee, in order that in that character he might know the real value of it, and thereby be the better qualified to sell it to advantage. This then I consider as a part execution of his trust : but then Hampton's knowledge ought to be Fox's knowledge, and upon this arises a question which I think material ; whether a trustee, gaining a knowledge of the subject in the execution of his trust, and at the expense of the *cestui que trust* (for I suppose the expenses incurred by the trustee must fall ultimately on Fox), and that knowledge consequently belonging to the *cestui que trust*, whether a trustee may not in this respect have the hand of justice laid upon him if this knowledge is made use of by him to circumvent his *cestui que trust*, so as to afford a distinct ground of fraud in a Court of Equity. I am rather at a loss to find what the evidence affords to this point. It appears, however, that Hampton staid on the estate till the 17th January. In these circumstances Mackreth began to deal with Fox remaining in his character of a trustee. Fox had a valuation of the estate made by Jackman, which though not very full or particular, yet afforded the general terms for a treaty and agreement, and it went generally to shew that the estate was capable of being improved about 100*l.* per annum. On this valuation lying *in medio*, one party says the estate is worth 47,000*l.* Mackreth

[*326]

1788.

Fox

v.

MACKRETH.

[*327]

reasons on this survey, and says, first, that the houses are valued too high; secondly, that 32 years purchase for the lands is too much; next, that 40 years purchase for the lord's rents is out of all sight: thus running down the valuation made by *Jackman, he argued down Fox, either from conviction or a sense of his distress, not indeed so low as 36,000*l.*, which Mackreth first proposed, but to a medium price of 39,500*l.* The first question to be asked is, whether the character of a trustee shall vary the consequence of this transaction from what it would be in the case of a stranger; for it has not been argued, I think, that in the case of a stranger this bargain could be rescinded. Now to what conclusion does the character of trustee go in this case? If a trustee, though strictly honest, buys an estate himself, and then sells it for more, yet according to the rules of a Court of Equity, from general policy, and not from any peculiar imputation of fraud, a trustee shall not be permitted to sell to himself, but shall remain a trustee to all intents and purposes. It is not therefore in that view that Mackreth being called a trustee can operate; it does not rest on the name of a trustee, or on the legal or equitable relation of trustee, but on the familiar intercourse between him and Fox. Now, can I, putting myself in the place of a jurymen, pronounce that Fox, agreed to the price trusting that Mackreth knew the price and represented it fairly to him? If A. says to B., I know the value of the subject, and if you will trust me, I will fairly tell you what it is worth, and A. at the same time knows the value to be double what he represents it to be, this is such an abuse of confidence as shall be relieved against; not because A. is a trustee, but because he stipulated with B. to tell him fairly the value, and he broke that stipulation; and then to be sure it makes full as strong a case as that of a trustee. But was this the express or the tacit understanding of the parties here? I have no materials to affirm this fact upon; at least I am considerably in doubt how to find any evidence of this; where one party asserts one sum to be the value of the estate, and the other, another, and both try to make the best of the bargain. At the same time there are such circumstances respecting the manner in which Mackreth undertook the trust

as make me hesitate. All this makes the question of the real value of the estate extremely material. *I do not think it could have been sold at the time according to the rate of Jackman's valuation ; and Mackreth's observations upon this seem to me to be well founded. No evidence has been adduced to shew his valuation to be correct. Now see what follows on the 16th January. Garforth was called up and desired to put their agreement into writing. I do not see why it was necessary that this memorandum should be signed by both parties. I at first thought it shewed an eagerness to get the bargain made ; but it seems it was agreed that more regular articles should be executed afterwards ; the execution of these articles carried the transaction one step farther in point of form ; still, however, the conveyance was not executed. It is asked whether any man of honour would let Fox execute the deeds, after he had actually sold the estate for a much larger price. Many men perhaps would do it, but I should never allow it to be the transaction of an honest man. Mackreth had forced himself into the confidence of Fox, and was called upon by every tie of honour and of honesty to consider himself as a trustee ; but my doubt is, whether this is not too general a line to lay down in a Court of Justice.

As to the manner of Mackreth's paying Fox the purchase money, it has been much observed upon, but I do not see much in it: he had not the money by him, which may readily be supposed, but he gave an accountable note with 5 per cent. interest ; and, to be sure, his note was just as good as a bond : very little danger of losing the money from a man of Mackreth's fortune ; besides, it was a sort of lien on the estate. The manner in which the accounts are made up by Mackreth is objected to, and it is said that this shews a confidence reposed in Mackreth by Fox ; so it does, but the question is whether this confidence is *ad idem*—whether it shews a confidence on the part of Fox, that Mackreth would tell him the true value of the estate. It is then said that he was called upon to do several subsequent acts ; but these are to be so naturally accounted for by other circumstances, that I do not see how fraud can be inferred *from these. They are then spoken of as instances in which Fox has confirmed the original purchase. As to confirmation, it has been considered by

1788.

 Fox
 v.
 MACKRETH.
 [*328]

[*329]

1788.

Fox

v.

MACKRETH.

the Court in very different ways. In *Lord Chesterfield v. Jansen* the Court did not go on confirmation as it is usually understood, but on this, that Mr. Spencer with his eyes open, and after the death of the Duchess, and when his situation was totally changed, thought proper to confirm the former bargain. So the judges assistant relied on this principally, and did not give much opinion on the former part of the case. I wish they had gone further; for as to the confirmation, he stood at that time under the former bonds. Another way in which confirmation operates is, by shewing that the party then thinks himself to have been fairly dealt with. This occurs in the present case on the 28th January. Again, on the 25th April, Fox did not see he had had any advantage taken of him. The use that I think is to be made of such confirmations is, as a proof that the party has seen no occasion to complain. In this view the present case is still stronger, for no complaint was made of this transaction till 1781, and therefore it is fair to infer, that so notorious a disproportion of price as is now insisted upon was not within the suspicion of those who dealt for Mr. Fox; and it certainly would have been better if this suit had been brought earlier, for when are the affairs of mankind to be at rest? Nay, more than this, it is evident, and indeed not denied by the plaintiff's counsel, that the transaction never would have been impeached, if Page had not given so large a price for the estate. This very much shakes my idea of the real value of it. If this estate, situate near London, had been really sold at a great undervalue, the friends of Mr. Fox must have known it by other means. Supposing the transaction with Page to be purely accidental, and not springing out of the actual value, it never can affect this question. At the same time it is observable, that Mackreth has produced no evidence of the value of the estate, to shew that it was not worth more than what he gave Fox. I have been desirous of stating my thoughts on this case, that the gentlemen concerned may be apprized of them, as *it will very possibly be necessary to have this matter discussed farther, even before me. I have conversed with the Master of the Rolls and the Judges, with a wish to find some rule of evidence on which I can go in this case, without running the hazard of shaking too much the contracts of man-

[*330]

kind. It is of very little consequence to the public to lay down definite rules of law, if you have indefinite rules of evidence. I shall therefore, at present, only direct an inquiry into the real value of this estate; and if, upon that inquiry, the value should turn out to bear a considerable disproportion to what Mackreth gave for it, I shall probably require some assistance in laying down such rules of decision as will set men at ease as to the disposition of their property.

1788.
Fox
 v.
 MACKRETH.

His Lordship, however, did not direct any such inquiries, but after the lapse of a considerable time affirmed the decree, saying only, that he had considered the case very much, and that he could not see that his Honour's decree was wrong.

The defendant afterwards petitioned his Lordship for a rehearing of the appeal; but that petition was dismissed.

He then appealed to the House of Lords, but the appeal was dismissed with costs on the 14th March 1791.

CORYTON *v.* HELYAR.

(2 Cox, 340—349.)

In this case an absolute term of 99 years limited to J. C. amongst other limitations of a real estate under a will, was, with reference "to the true construction of the several parts of the will," considered not as an absolute term, but as determinable on the death of J. C.

1745.
 Aug. 10.
Lincoln's Inn
Hall.
 HARDWICKE,
 L.C.
 [340]

THIS cause standing for the opinion of the Court, his Lordship was pleased this day to give his opinion as follows:

The end of this bill is to have the will of Sir William Coryton, the father of Sir John Coryton, established, and to have the trusts performed, to have an account of the rents, &c. till Sir John Coryton, the son of Sir William Coryton, attained the age of 27, and to have them applied according to the directions in the will, and an account of the rents from the death of Sir John

1745.
 CORYTON
 v.
 HELYAR.

Coryton, the son, and that they may be paid to the plaintiff, and that possession of the estate in question may be decreed to the plaintiff.

The case arises upon the will of Sir William Coryton, which is penned very obscurely. He made his will the 2nd of December, 1711, and gave to his wife 4,000*l.* with several specific legacies in satisfaction of her jointure, and of all claims which she should have out of his estate. The testator then "for the settling, continuing, and preserving his real estate in his name and blood, gives and devises all his manors, lands, &c. to Sarah Coryton his wife, and others, and their heirs and assigns, and to the survivor and survivors of them and their heirs, and to the heirs and assigns of such survivor, determinable as therein declared, limited, and expressed, and for no other or longer time or term, upon the several uses, trust, and confidence following, viz. to them, his said wife, &c. and their heirs and assigns, until his son John Coryton shall attain the full age of 27 and no longer, in trust, in the mean time out of the rents, &c. to pay and discharge such sums and legacies as his personal estate shall not be able to pay in reasonable time, and in the first place for the payment of the 4,000*l.* to *his wife; and after these several payments in trust for the making good all leases and grants made by him, if any dispute should arise concerning them; and after those trusts performed then in trust, to lay out all the monies by them received or raised remaining in their hands in the purchase of land to be settled in the same manner as his manors, &c. are thereafter settled; and from and after the estate limited to them in use and trust as aforesaid, and his son's attaining the age of 27, then to the use of said Sarah Coryton the wife, and the other trustees, and their heirs, and the survivor and survivors of them, and his and their heirs, shall stand and be seised of all and singular the lands, &c. so to them devised as aforesaid to them and their heirs, to the use and behoof of his said son John Coryton and his assigns, for and during the term of ninety-nine years without impeachment of waste, and from and after the determination of that estate, then to the use and behoof of the said Sarah Coryton, Edward Lyttleton, &c. and their heirs, and the survivor and survivors of them and his and their heirs, for

[*341]

and during the natural life of the said John Coryton, to preserve contingent remainders, but to permit the said John Coryton and his assigns to receive and take the rents, &c. thereof, and from and after the death and decease of the said John Coryton," then to the use of the first son of the body of the said John Coryton and the heirs male of his body, and so to the 10th and the heirs male of their bodies, and for default of such issue to the use of the heirs of the body of the said John Coryton, and in default then to the daughter of the testator and the heirs of her body, remainder to his nephew John Goodall, the plaintiff's father, upon condition that he forthwith, after his the testator's dying without issue as aforesaid, and the estate descending to him, take and use the name of Coryton, then to trustees to preserve, &c. then to the first son of John Goodall, &c. in tail, taking the name of Coryton, "and for ever after constantly using and writing the name of Coryton in all his and their writings and grants, and in all other his and their transactions;" and for want of such issue of him, or in default of his taking the name as aforesaid, remainder over. Then he directs *that the trustees should have the power to make leases till his son's attaining the age of 27, and after that time the son was to have the same power; and if his son should marry before that age, then the trustees were to join with the son in making a jointure for such wife; and if he did not marry till after 27, then the son himself to make such jointure in proportion of the fortune of the wife; and if there should not be sufficient to pay the legacy of 4,000*l.* and a legacy of 500*l.* then he devised his manor of L—— to the trustees to be sold for the raising the money.

The testator died in October, 1712, and his wife survived him. The trustees permitted Sir John to receive the rents during the continuance of the estate till Sir John came to the age of 27. The wife accepted the legacy in satisfaction of her jointure. The son Sir John afterwards married, and made a jointure on his wife.

In 1739 Sir John died without issue, and made his wife his executrix. In 1741 the widow of Sir John died, and made the defendant Helyar her executor, and devised the 99 years term created by the will of Sir William. The representatives of the

1745.
CORYTON
v.
HELYAR.

[*342]

1745.
CORYTON
v.
HELYAR.

widow claim this term as part of the personal estate of Sir John Coryton. This bill is brought by Mr. Coryton, formerly Goodall, who is the son of the devisee John Goodall, insisting that he is entitled to the possession of this estate upon the death of Sir John Coryton without issue. The principal question is upon the limitation of the term of 99 years to Sir John Coryton, whether it is an absolute term, to end only by effluxion of time; or whether it is determined upon the death of Sir John; the other questions will depend upon the determination of this.

1st. Whether the limitations to Sir John are uses executed by the statute or trusts?

2nd. Whether, upon the frame of this will, this term of 99 years ought to be considered as an absolute term, or determinable upon the death of Sir John?

[*343] There are three kinds of estates. 1st. The old common law fee. 2nd. Uses, which were the creatures of equity; but since the statute of H. VIII. are turned into legal *estates, and now are considered as the old common law fee. 3rd. Trusts, which the common law takes no notice of, but is a creature of this Court as an use was at common law. There cannot be an use upon an use; wherever the first use is limited, the estate in the lands is executed. This was first settled in *Chudleigh's* case, where it was held that an use cannot be raised out of an use, nor can any contingent use be raised out of the estate of *cestui que use*, but out of the estate of the feoffees.

The clause that gives the estate after the determination of that estate, which was given until Sir John Coryton came to the age of 27 is, "from and after the determination of that estate, to the trustees and their heirs that they or the survivor of them shall stand seised of the estate to them and their heirs to the use of Sir John Coryton during the term of 99 years." It is clear that here is a second use to arise upon the first. It was objected that the first devise being to trustees and their heirs till the son attains the age of 27, this excludes the legal estate in them any longer than that time; that would be true if the matter rested there; but the testator afterwards makes a complete new devise to them and their heirs, which vests the whole legal estate in them. The next objection is, that the last devise to the trustees is not grammar;

but I am of opinion that it is. Third objection is, from the different penning the several powers: till the son comes to the age of 27, power is given to trustees to receive the rents and profits, to make leases and join in making a jointure, but after the son attains 27, then the son is to make leases without the trustees, and so he is to make a jointure. It was said that this shewed the testator's intention, that till the son attains the age of 27 the trustees should have the legal estate, and then that the son should have it. The question here is, not what the testator meant to do, but what he hath actually done. The testator endeavoured to prolong the minority of his son until 27; for that reason he hath made the joining the trustees in several acts necessary till his son's attaining 27. Such powers may be given to a *cestui que trust*, and under that power a legal estate may pass to the lessee. In point of law these powers would be considered as a bare authority, but when they are executed they convey a legal estate: if then the legal estate is in the trustees, the Court must decree them to make a conveyance: but then the question is, to whom this conveyance is to be made, that is, whether the first limitation of 99 years ought to be to the executors of the son Sir John Coryton, or whether the first limitation should be made in tail male? Whether upon the frame of this will the term of 99 years ought to be considered absolute, or determined upon the death of Sir John. If it was absolute, the first limitation must be to Sir John's executors; if it was determinable on the death of Sir John, he being now dead, that is determined. It must be admitted that there are no words in the will to make it determinable. It must likewise be admitted that this term may be made determinable upon the force of other clauses, without any express words. Whether there are any such here is the question.

1st, From the words of the clause which more immediately relates to the devise to Sir John Coryton and his issue. 2nd, From the intention of the testator arising out of the other part of the will.

As to the first, the limitation is to Sir John Coryton and his assigns, without saying "his executors and administrators," though no great weight is to be laid upon that; but it is remarkable, that in this will there is great tautology and no scarcity of

1745.
CORYTON
v.
HELYAR.

[*344]

1745.
CORYTON
v.
HELYAR.

words. The argument of the greatest weight arises out of that part of the will which devises the estate to trustees for preserving contingent remainders, and to the first son, &c. the words are, "from and after the determination of the estate (the term) to the use of the trustees and their heirs, to preserve contingent remainders from being defeated, &c. and from and after his death, then to the use of the first son in tail male." This is sufficient to preserve the estate of Sir John Coryton for his life, and no longer; for it will not preserve the term of 99 years from forfeiture, and the testator would have provided for that if he had intended it should have continued.

[*345]

*The trusts are in the common settled form of conveyance: the remainder to the first son is in common form. To construe this will that the first son should take immediately, and that the term should be determinable, would answer every intention in the will. It leaves the interest in Sir John Coryton for life, and carries the estate on to the family after his death, and makes a provision for the son. The other construction gives the eldest son only a dry freehold, subject to a term which might continue longer than his own life, or even the life of his grandson; and this for the sake of the executor of Sir John, who might be a stranger to the testator, and for whom he could not possibly have any consideration.

It was admitted that if the words, "from and after the death of Sir John," had followed immediately after the limitation of the term of 99 years, it would have varied the construction; but as they follow the limitation of the estate to preserve the contingent remainders, they can only relate to the freehold. The only reason for making Sir John tenant for 99 years, and not tenant for life, was because there was a subsequent limitation to the heirs of his body; therefore if he had suffered a common recovery, the estate for life being united to that estate, it would have barred the heir, though it would have left the contingent remainder to the son by reason of the remainder in the trustees, to preserve it. The giving a term prevented that; and if he had suffered a recovery, he would have forfeited that. Therefore if the intention was that the term should continue, the testator would have used words to have preserved it from forfeiture. To say

that those words from and after the death, &c. would have varied the construction, if following the limitation of the term of years, is an admission that it is only the interposition of the remainder to trustees, that prevents the plaintiff from taking this estate, which is the same as to say that an unnecessary limitation shall have an effect to destroy the will. This is a trust, and the whole legal estate is in the trustees, and so supports all the trusts, (1 Wms. 56,) whether vested or contingent. The reason why the law requires a freehold to support a *remainder in contingency is, that the freehold cannot be in abeyance; but that will not hold in the case of a trust: in this case the trustee is tenant of the freehold.

There is a very great opinion that this rule of law never prevailed upon the limitation of uses before 27 H. VIII. *Chudleigh's* case. It is there laid down, that before the Statute of Uses, if a man had made a feoffment to A. for years, and after to the use of the right heirs of J. L. such remainder would have been good (after the statute it became indeed a legal estate): this is a plain authority that the estate in the feoffees was sufficient to support the contingent remainders. It would be absurd to suffer a clause that is merely void, to overturn the whole intention of the will.

As to the testator's intention arising from the words of the will; here is a general declaration of his intention for continuing his real estate in his name and family; he makes his son a minor till 27, to make a fund for the exoneration of his estate from his debts, and directs the surplus of the profits to be laid out to increase his estate. He makes his son Sir John tenant for 99 years, remainder to trustees to preserve contingent remainders, remainder to the first son of Sir John, in tail male, remainder to John Goodall for life, remainder to every son in tail male, and directs them to change their name to Coryton. This settlement is strictly to preserve the estate in his name; but to adhere to a literal exposition of this will, would destroy his intention; if this term should go to the executors of Sir John, it would be giving the estate from the family till the expiration of 105 years after the making the will: the reversion of this estate after such a term would be worth very little. If Sir John had left a son who would have been the heir of the

1745.

CORYTON
v.
HELYAR.

[*346]

1745.
 COBYTON
 v.
 HELYAR.

[*347]

estate and title, and for whom so much care had been taken, it would have been very hard to say he should not take anything till after the expiration of 99 years; and the case is the same as to the plaintiff Coryton. He is to change his name forthwith upon the dying of Sir John without issue; this is a strong argument of his intention, that he should then *have the benefit of the estate, and not that he should change his name for the sake of a dry reversion. Particular power is given to the son to make a jointure; if he had had the absolute term of 99 years, that would have enabled him to have made any lease that would have lasted the term of a wife's life; and though, it being a term, such a jointure would not be good at law, yet it would have been good in equity, by way of satisfaction of dower. The testator hath not given Sir John any part of the estate till 27, and yet the defendants say that the son Sir John hath power to dispose of the whole estate of 99 years, though he had died before 27. It was admitted that it was not easy to assign any good reason, why the testator should intend that this term should be severed from the inheritance; but it is said, perhaps it might be the testator's intention to give Sir John power to dispose of it to his sons: but that is contrary to the whole will. Another reason was, that it might enable him to raise portions for younger children; but nothing at all of that appears in the will. But then they say, whether he had good reason for it or not, he hath done it, and that here is an express estate given for 99 years; that it is a rule that where a certain estate is given it shall not be enlarged by implication, nor shall it by implication be abridged.

That a certain estate shall not be enlarged by implication, there are many authorities, and yet there are many cases where that rule hath not prevailed. In *King* and *Melling* there was an express estate given for life, and the rule of law till that time was confined to the words "heirs of the body," to make an estate tail by limitation; yet there it was held, that though there was an express estate it should be enlarged. *Langley* and *Baldwin* was a strong case of an estate enlarged by implication; this case is reported in *Equity Cases Abridged*. I have looked into the Register's books in 1706, l. B. folio 578. The limitation is to J. L. the testator's grandson for life, without impeachment of waste,

with power to make a jointure, then to his first son, and so to his sixth son in tail male; and, if he should die *without issue male, then remainder over: it was there held by the Judges of the Common Pleas, to whom this case was sent, that J. L. the grandson took an estate tail. In *Equity Cases Abridged*, in the report of this case it is said, the opinion of the Judges was, J. L. took an estate† for life, but it is wrong. The reason of this determination was to answer the intention of the testator, and to let in all the children of the grandson, and that the remainderman should not take till his own male descendants were extinct. This case differs from *Popham* and *Bamfield*: because the limitation there takes in all the sons, and therefore the Judges would not construe the express estate to be enlarged by implication, because the testator had made an absolute provision for all his male descendants of his family. Therefore this rule, that certain estates are not to be enlarged by implication is not without some limitation. As to the rule that certain estates are not to be abridged by implication, that is not a rule laid down in any of the books, as I can find; though, there are cases where that reasoning is made use of. If an estate is given to A. and his heirs, and if he die without issue then to B.: by the words, if he die without issue, the law by implication turns his fee simple first given into an estate tail (1 Wms. 25.) It was said that there must be a necessary implication, and not a probable one only. It is true the Court must not take conjecture for implication; there is hardly any case where an implication is of necessity, but it is called “necessary,” because the Court finds it so to answer the intention of the devisor. In *Langley* and *Baldwin* there was no natural necessity; but the Court construed an estate to arise by implication, for otherwise the disposition would be absurd. There could not be a more absurd disposition than that a man should declare his intention to keep his estate in his family, and yet remove it from them, for 99 years. This is a common case of construction to find out what force and effect the latter words in a will, will have upon the former part of it.

*The decree, so far as it related to the said term of 99 years, was as follows: “And a question having been made in the cause,

† This mistake appears to be corrected in subsequent editions.

1745.
CORYTON
v.
HELYAR.
[*348]

[*349]

1745.
CORYTON
v.
HELYAR.

whether the term of 99 years limited by the will of Sir William Coryton in the said trust estate to Sir John Coryton his son, is an absolute term, or was determinable by the death of the said Sir John Coryton, his Lordship doth declare he is of opinion, that according to the true construction of the several parts of the said Sir William Coryton's will, the same ought not to be deemed an absolute term, but determinable; and that the same is determined by the said Sir John Coryton's death, and therefore his Lordship doth order and decree, &c."—Reg. Lib. A. 1744, fol. 596.

See this case cited by Lord MANSFIELD in 2 Burr. Rep. 923, and 3 Burr. Rep. 1631.

1794.
Feb. 15.
Rolls Court.
ARDEN, M.R.
[384]

RINGROSE v. BRAMHAM.†

(2 Cox, 384—385.)

The testator gave to A. B.'s children "50*l.* to every child he hath by his wife, to be paid them as they shall come of age." There were eleven children at the date of the will; thirteen at the testator's death, and three born afterwards. The thirteen children living at the death of the testator, are entitled to their legacies, but not those born afterwards.

THE question in this cause depended upon the following clauses in the testator's will :

"I also give to Joseph Ringrose's children 50*l.* to every child he hath by his wife Elizabeth, to be paid to them by my executors as they shall come of age, and the interest to be paid yearly till they come of age to their father or mother. I also give to Christopher Rhodes's children, that he hath by his wife Peggy, 50*l.* to every child when they come of age, and the interest to be paid yearly till they come of age to their father or mother. And my will is, that my two executors do lodge in Mr. W. Foxhall's hands 600*l.* and 100*l.* in Joseph Ringrose's hands till the children aforesaid come of age, and to receive the interest yearly, and to pay the same to the above-named children or their father or mother. And if any of the children should die before they are of age, then the legacies shall go to my executors."

There were eleven children of Joseph Ringrose and Christopher

† *Rogers v. Mutch* (1878), 10 Ch. D. 25; 48 L. J. Ch. 133.

Rhodes living at the time of the making the will ; thirteen at the death of the testator, and three born since.

This bill was filed by the sixteen children of Joseph Ringrose and Christopher Rhodes, claiming to be entitled to 50*l.* apiece under the above bequest.

And it was insisted on the part of the plaintiffs, that there was nothing to confine these legacies of 50*l.* to the children living at the time of making the will, or to those living at the death of the testator : that although the testator has made use of the word "hath," which is properly of the present tense, yet it is evident that he meant thereby "shall have," in the same manner as he afterwards uses the word "come" for "shall come ;" that the sum which he has set apart for the payment of these *legacies does not tally with the number of the children living at any one of these periods, and therefore nothing can be inferred from thence, except that he did not mean to confine the legacies to the children living at the date of the will ; that as the legacies are not to be paid to the respective legatees until they attain 21, this will at least let in all the children born before any of them arrives at that age. *Gilmore v. Severn*, 1 Bro. Cha. Rep. 582.

1794.

RINGROSE
v.
BRAMHAM.

[*385]

MASTER OF THE ROLLS :

The case of *Gilmore v. Severn* is very distinguishable from this. In *Gilmore v. Severn*, a gross sum of 350*l.* was given to the children of Jane Gilmore, to be paid to them in equal shares at 21, and there was no inconvenience in postponing the vesting of those shares until some one of them attained that age, so as to let in the children born in the meantime, because there was nothing to do but to set apart the sum of 350*l.* and the residue of the testator's personal estate might be immediately divided ; for whether more or fewer children divided the 350*l.* still they could have but 350*l.* amongst them. But here there are distinct legacies of 50*l.* to each of the children, and therefore if I am to let in all the children of these two persons born at any future time, I must postpone the distribution of the testator's personal estate until the death of Joseph Ringrose and Christopher Rhodes, or their wives, for I can never divide the residue until I know how many legacies of 50*l.* are payable. Therefore though I

1794.
RINGROSE
v.
BRAMHAM.

perfectly assent to *Gilmore v. Severn*, it is not applicable to this case. At the same time I think I may fairly construe the word "hath," so as to make it speak at the time the will takes effect, and let in the children born between the making of the will and the death of the testator.

His Honour therefore declared the thirteen plaintiffs only who were living at the death of the testator, entitled to legacies of 50*l.* each.

1794.
Trinity Term.

LOUGH-
BOROUGH,
L.C.
[394]

THOMAS v. POWELL.

(2 Cox, 394—396.)

In a suit for the payment of creditors the real estates of the testator were ordered to be sold. A. being reported the purchaser of one of the estates for 14,480*l.*, entered into possession and accepted the title, and proper conveyances were executed. On application by the creditors to have the purchase money paid out, the purchaser stated that the tenants of the estate had been served with a writ of right at the suit of a person who claimed the whole estate under an adverse title. But the Court thought that the purchaser having accepted the title, &c., could not now prevent the money being paid out of Court, and ordered accordingly.

By the decree made on the hearing of this cause, parts of the estate of the testator William Dawkin were ordered to be sold for the payment of creditors.

On the 11th September, 1792, W. Digby, Esq. became the purchaser of an estate called the Monknash estate for the sum of 14,480*l.*

By an order of 29th July, 1793, it was ordered that Mr. Digby should be at liberty to pay his purchase money into the bank, and be let into possession of the purchased estate, and the purchase money was not to be paid out without notice to Mr. Digby.

Mr. Digby accordingly took possession, and soon afterwards the title was approved by him, and the conveyance executed by all necessary parties.

In the course of the last term it was moved on the part of the residuary devisees of the testator, that this purchase-money (together with other funds in Court in this cause) might be paid out in discharge of several specialty debts which had been reported due;

and notice of this motion was served upon Mr. Digby. It then appeared that the tenants of the Monknash estate (together with the tenants of great part of the other estates of the testator) had been lately served with a writ of right at the suit of a person of *the name of Stradling, who claimed the whole of the estates upon a title adverse to that of Mr. Dawkin; and Mr. Digby therefore insisted that his purchase money ought not to be paid out of Court during the pendency of this suit, by which he might possibly be evicted, and it was insisted on his part, that this Court would at any time, until the purchase money was actually paid out of Court, stop it for the purpose of doing justice to the purchaser, as was frequently done where some outgoing or other incumbrance was discovered in respect of which the purchaser was indebted to an abatement; and nothing was more common than to make an allowance to the purchaser under such circumstances, even after the conveyance was executed; still more would the Court look to the security of the purchaser, where he was in danger of being evicted from his whole purchase.

On the other hand, it was insisted that a purchaser came too late with this objection after he had accepted the title and conveyances, and entered into possession; that the meaning of the common order made by the Court, that the purchase money should not be paid out without notice to the purchaser, was only to secure to the purchaser his conveyance; that the purchaser was to judge of the title before the conveyance was executed, and if he had any doubt about it, he might have that doubt resolved by the Master of the Court, who would not even compel him to take a doubtful title; but after the title was accepted and the conveyances executed, the transaction was complete, and the Court would not afterwards impound the money upon any apprehensions of the purchaser; and indeed if he were actually evicted, he must have recourse to the covenant in his conveyances, as in any other case between vendor and vendee.

And the LORD CHANCELLOR (after some days' consideration) said that the Court having given Mr. Digby possession of the estate which he had purchased, and a conveyance under a title which he himself had previously approved, had done all it could for the

1794.
THOMAS
v.
POWELL.

[*395]

1794.
 THOMAS
 v.
 POWELL.
 [*396]

purchaser, who could not be heard *at this stage of the business to object to the application of the purchase money.

And his Lordship ordered the purchase money to be paid out to the creditors according to the notice of motion.

1794.
 July 25.
Exchequer.

CROSSLING v. CROSSLING.

(2 Cox, 396—397.)

Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her at her decease, as she should think proper.

The wife made no disposition of the estate.

The children take no interest in the estate under the will.

THE testator in this case devised a freehold estate to his wife for her life, after which followed these words, "and she shall dispose of the same amongst my children by her at her decease as she shall think proper."

The wife made no disposition of the estate.

An ejectment having been brought by the heir at law after the death of the wife for the recovery of the premises, as being undisposed of by the will, the present bill was filed by the children of the testator by his said wife, insisting that these words were imperative, and amounted in equity to a devise to the children after the wife's death, and praying an injunction to stay proceedings on the ejectment.

Upon motion for dissolving the injunction, it was insisted on the part of the plaintiff, that in cases where the testator had clearly expressed a wish that certain persons should have a certain benefit under his will, and no doubt could be raised as to his intention, either as to the person or subject, it did not signify whether he used the words "give" or "devise," or the words "desire," "recommend," "request," &c.; it was sufficient if he manifested his intention.

But the Court said that the cases alluded to (which in general

arose upon bequests of personal estate) were cases in which a fund was by the will given absolutely, but after such bequest there followed words of desire or recommendation in favour of certain persons after the death of the first legatee; there the Court had holden the first legatee to be *a trustee for the persons so recommended, and had given the fund accordingly after his death: but in this case there was an express devise of a real estate to the wife for her life, with a power for her to dispose of it amongst the children, which power she had never executed.

1794.
CROSSLING
v.
CROSSLING.

[*397]

The consequence was, that the estate descended after her death to the heir at law; and there was no instance of the Court declaring an heir at law (who claimed *dehors* the will) to be a trustee for the objects of such a power. And in the present case the Court refused to continue the injunction to hearing the cause.

WALLOP v. WARBURTON.†

(2 Cox, 409—411.)

One of the defendants was admitted to sue *in formâ pauperis*. The decree ordered generally that the costs of all parties should be taxed and paid out of the estate. The costs of the pauper defendant shall be taxed as *dives* costs.

1795.
Feb. 19 and
March 21.

Lincoln's Inn
Hall.

LOUGH-
BOROUGH,
L.C.
ARDEN, M.R.

[409]

LLOYD moved that the Master might be directed to tax the defendant Martha Browne's costs in this cause in the usual manner as *dives* costs.

The decree ordered generally that all parties should be paid their costs out of the estate.

But the defendant, Martha Browne, having been admitted to defend *in formâ pauperis*, the Master would not tax her costs in the usual manner without the particular direction of the Court.

Lloyd insisted, that although a pauper could pay only pauper costs, yet when entitled to receive costs, he was to have *dives* costs; and the reason is, that the counsel, &c. give their assistance to the pauper, but not to the other party. So *Scatchmer v. Foulkard*, 1 Eq. Ca. Ab. 125.

† *Carson v. Pickersgill & Sons* (1885), 14 Q. B. D. 859, 870.

1795.
WALLOP
v.
WARBURTON

[*410]

"In *Hinckley v. Appleby*, the plaintiff was admitted to sue *in formâ pauperis*, by order of 25th January, 1753. On 20th February the defendant was ordered to pay the plaintiff 50*l.* on account of her poverty, without prejudice. By the decree made on the hearing of the cause on the 23rd July, 1754, it appearing that the arrears of the weekly payment of 10*s.* given to the plaintiff by the will of the testator C. Appleby, from the 9th September, 1744, to 19th July instant, being nine years and forty-three weeks, amounted to the sum of 255*l.* 10*s.* and that the defendant had paid to the plaintiff, pursuant to the order of the 20th February, 1753, the sum of 50*l.* in part of such arrears, which left 205*l.* 10*s.* due to the plaintiff; *and the defendant admitting assets, it was ordered that the defendant should pay to the said plaintiff the sum of 205*l.* 10*s.* on or before Michaelmas next, and should continue to pay to the plaintiff the weekly allowance of 10*s.* for the future, as the same should become due. And it was ordered that the defendant should pay to the plaintiff her costs of the suit, to be taxed by Mr. Holford, one, &c. These costs were afterwards taxed in the usual manner as *divers* costs, and no objection taken."

On the other side, the *Solicitor-General* cited *Angell v. Smith*, Pre. Cha. 219, which is in direct opposition to the opinion of Lord SOMERS, in *Scatchmer v. Foulkard*.

It was admitted that there were great doubts in the offices about this practice.

LORD CHANCELLOR ordered the costs to be taxed in the usual manner, as *divers* costs.

On the third seal the *Attorney-General*, supported by the *Solicitor-General*, moved on the part of the plaintiffs to discharge this order. The cases were again mentioned and considered, and now the matter was again mentioned before the Lord Chancellor and the Master of the Rolls, and it was particularly contended by the *Solicitor-General*, that the order as it now stood would be holding out great encouragement to paupers and their attorneys to make experiments in desperate suits (which was contrary to the policy of the Court) inasmuch as if the pauper failed the

attorney would lose nothing but his trouble ; and if he succeeded, the attorney would be in a better situation than usual, as he would be paid the usual costs without having been under the necessity of making the usual disbursements in the course of the cause. The *Solicitor-General* cited a case of *Denne v. Russell*, in December, 1769, where the plaintiff applied to dismiss his own bill with costs against a pauper defendant, and the order was made generally : the Master taxed *dives* costs ; but on an exception to the Master's report the Lord Chancellor, assisted by the Master of the Rolls, allowed the exception, and directed only pauper costs to be taxed.

1795.
WALLOP
v.
WARRBURTON.

The LORD CHANCELLOR said he had considered this *question very much, and had inquired what the practice was in the Courts of Law, where he found that if a pauper plaintiff recovered 5*l.* he was *ipso facto* dispaupered ; that the enabling a party to sue or defend *in formâ pauperis* was only to enable him to bring forward his claim in a regular manner before the Court ; but when that right was ascertained, it was never intended that the party who contended against it should be excused from the costs which, according to the course of the Court, he was liable to pay for resisting a just demand ; that this practice might certainly be open to some abuses ; but upon principle and practice his Lordship thought the order was right, especially as the costs in this case were to come out of the estate.

[*411]

His Honour was of the same opinion, and added that if a trustee, made defendant in a cause, should happen to be in the situation of suing *in formâ pauperis*, but was clearly entitled to have his costs out of the estate, surely there could be no reason why those costs, when ordered, should not be taxed as *dives* costs.

The COURT was therefore of opinion that the former order was right.

1795
July 24.
Lincoln's Inn
Hall.
 LOUGH-
 BOROUGH,
 L.C.
 [415]

RIGBY *v.* MACNAMARA.†LAW *v.* RIGBY.

(ON EXCEPTIONS TO THE MASTER'S REPORT.)

(2 Cox, 415—420.)

B. as a surety for A. became bound with him in a joint bond to C. and D. in a penalty of 180,000*l.*, with conditions for payment of 90,000*l.*, with interest at 5*l.* per cent. By a counter bond of the same date A. became bound to B. in a like penalty, with condition to save harmless, and indemnify the said B. his heirs, executors, &c., from payment of the said sum of 90,000*l.* and interest, and from all damages he might sustain for or on account of the non-payment of the said sum of 90,000*l.* and interest. After the deaths of A. and B. the executors of B. were called upon to pay, and actually did pay, to C. and D. 22,000*l.* on account of the principal, and several large sums on account of the interest of A.'s debt. In a suit for the administration of A.'s estate, the Court allowed the executors of B. to come in as creditors for the several sums of money so paid by them, and for interest on the 22,000*l.*, but not for interest on the several sums of money paid by them to C. and D. for interest on the original debt.

By bond of 20th December, 1782, John Powell, Esq. became bound with the Right Hon. Richard Rigby to Robert and Henry Drummond in the sum of 180,000*l.* with condition for the payment to Messrs. Drummond of the sum of 90,000*l.* with interest for the same at the rate of 5*l.* per cent. on the 20th Feb. then next.

By a counter-bond of the same date the said Richard Rigby became bound to the said John Powell in 180,000*l.* with the following condition under-written :

[*416] *" Whereas by bond or obligation, bearing even date with the above-written obligation, the above-named John Powell, at the special instance and request of the said Richard Rigby, is, together with the said Richard Rigby, bound to Robert and Henry Drummond, Esqrs. in the penal sum of 180,000*l.* with condition there underwritten for payment to the said Robert and Henry Drummond, their executors, administrators, or assigns, of the sum of 90,000*l.* with interest for the same, on the 20th day of February, next ensuing the date of the said obligation, Now the condition of the above-written obligation is such,

† *McKewan's case* (1877), 6 Ch. D. 447; 46 L. J. Ch. 819.

that if the said Richard Rigby, his heirs, executors or administrators, do and shall well and truly pay or cause to be paid unto the said Robert Drummond and Henry Drummond, their executors, administrators or assigns, the said sum of 90,000*l.*, together with the interest for the same, on the 20th day of February next ensuing the date of the said obligation; and if the said Richard Rigby, his heirs, executors and administrators shall and do from time to time, and at all times hereafter well and sufficiently save harmless and keep indemnified the said John Powell, his heirs, executors and administrators from and against the payment of the said sum of 90,000*l.* and interest, and from and against all costs, charges, damages and expenses, which he, they, or any of them can, or may sustain, or be put unto for, or on account of the non-payment of the said sum of 90,000*l.* and interest, or for or by reason of the said John Powell having executed the said in part recited bond to the said Robert and Henry Drummond in any wise howsoever, then the above-written obligation to be void, &c."

1795.
RIGBY
v.
MACNAMARA.

John Powell died in May, 1783.

In May, 1786, Mr. Rigby having paid to Messrs. Drummond 68,000*l.* in part of the 90,000*l.* and all interest for the same up to that time, Messrs. Drummond applied to Mr. Powell's executors for payment of the remaining 22,000*l.*

In April, 1788, Mr. Rigby died, and soon after his death the bill in the first-mentioned cause was filed by his devisees *against Mr. Macnamara the acting executor for an account of the personal estate, &c.

[*417]

March 5th, 1790, a decree was pronounced in that cause, whereby it was referred to the Master to take an account of the personal estate of Mr. Rigby, and it was ordered that the same should be applied in a course of administration.

But before any report was made in that cause, viz., in May, 1792, the bill was filed in the second cause of *Law v. Rigby*, by the creditors praying an account of the rents, and a sale of the real estate to supply the deficiency of the personal estate to pay the creditor's debts, and that the assets should be marshalled, and a receiver appointed.

On the 17th August, 1792, Mr. Powell's executors paid to

1795.
RIGBY
 v.
 MACNAMARA.

Messrs. Drummond the 22,000*l.* principal and 2,150*l.* 10*s.* 5*d.* for interest thereon from 1st May, 1786, to 15th April, 1788.

And in the course of the same month they paid Messrs. Drummond two further sums of 4,509*l.* 14*s.* 8*d.* and 234*l.* 11*s.* in full for the interest up to the day the principal was paid.

Mr. Powell's executors then brought an action against the heir and devisees of Mr. Rigby, upon the bond of indemnity, to recover the several sums so paid by them to Messrs. Drummond, with interest upon them from the respective days of payment. But before they could obtain judgment in such action, the defendants in the action filed their bill against the executors of Mr. Powell, praying that the accounts therein mentioned might be taken, and that the debt due to Mr. Powell's executors might be paid them out of the personal estate of Mr. Rigby under the decree in the first cause, or if the same should be insufficient for that purpose, then, that a competent part of the real estate might be sold to supply such deficiency, and that in the mean time the executors of Mr. Powell might be restrained from proceeding in the action. And an injunction was accordingly obtained.

[*418]

On 16th March, 1793, a decree was made in the said cause, and thereupon the executors of Mr. Powell carried *in their charge before the Master, whereby they claimed the several sums so paid by them to Messrs. Drummond, with interest on all of them from the days of payment.

The Master allowed them the several sums of 22,000*l.*, 2,150*l.* 10*s.* 5*d.*, 4,509*l.* 14*s.* 8*d.*, and 234*l.* 11*s.* and also interest on the said sum of 22,000*l.* but refused to allow interest on the other sums.

The executors thereupon excepted to the Master's report,

For that the said Master having allowed to the said exceptants, the several sums of 22,000*l.*, 2,150*l.* 10*s.* 5*d.*, 4,509*l.* 14*s.* 8*d.*, and 234*l.* 11*s.*, as due to them by virtue of the said bond of indemnity, which several sums had been paid by the exceptants out of the assets of Mr. Powell to Messrs. Drummond in discharge of Mr. Rigby's bond, the said Master had computed and allowed to the exceptants interest only on the said sum of 22,000*l.* but had not computed or allowed to the exceptants any

interest on the said sums of 2,150*l.* 10*s.* 5*d.*, 4,509*l.* 14*s.* 3*d.* and 234*l.* 11*s.* Whereas the said Master ought so to have done, &c.

1795.

RIGBY

v.

MACNAMARA

Lloyd and Cox, for the exceptants, argued that the Master ought to have allowed to Mr. Powell's estate interest as well on the sums paid by the executors in discharge of the interest due from Mr. Rigby to Messrs. Drummond as on the 22,000*l.* due for principal; that the estate of Mr. Powell was equally damnified by a payment in respect of interest as by a payment in respect of principal; that independently of the bond of indemnity, Mr. Powell's executors would be entitled to interest on all the sums paid by them in discharge of Mr. Rigby's debt, and would be allowed it in the shape of damages in an action at law: that in this case as the executors had been restrained by the injunction of this Court from proceeding in the action commenced by them upon the bond of indemnity, in which (as they apprehend) they should have recovered the whole of what they now demand, this Court will not deprive a fair creditor of his legal remedy without providing for the payment of the debt to the very utmost *extent of what he could have recovered at law: that here a very large penalty (much beyond the whole of the exceptant's demand) had become forfeited at law, and the condition of the bond is couched in the most comprehensive terms to include every possible damage that Mr. Powell or his estate could sustain in consequence of his becoming surety for Mr. Rigby; but it was impossible to say that Mr. Powell's estate would be fully indemnified without allowing interest on all the sums paid by Messrs. Drummond, whether for principal or interest: and it would therefore be a hard measure for a Court of Equity to relieve against the penalty which had so become forfeited without exacting a full compliance with the terms of the condition; that in the case of an assignment of a mortgage which has become absolute at law, and on which at the time of the assignment there is an arrear of interest which is paid off by the assignee as well as the principal, the assignee (it was insisted) would be entitled to interest on the whole sum paid by him (as well for

[*419]

1795. interest as for principal) before the Court would take from him
 RIGBY his legal estate in the mortgaged premises. *Smith v. Pemberton*,
 MACNAMARA, 1 Ch. Ca. 67; *Chamberlain v. Chamberlain*, 1 Ch. Ca. 258; in
 which this is spoken of as the settled rule of the Court.

But the LORD CHANCELLOR (without hearing the other side) was clearly of opinion that the Master had done right in computing the interest only on the 22,000*l.* and that Mr. Powell's executors could claim no more against Mr. Rigby's estate than Messrs. Drummond could have done, and consequently could not have interest on the interest paid them. That as to the assignments of mortgages, the distinction was where the mortgagor was party to the assignment and where not: that in the present case the assignee was entitled to the whole sum paid by him whether for principal or interest, but in the latter case he was entitled only to interest on the principal sum; and this he apprehended to be the settled rule of the Court, and that the cases cited must be considered accordingly.

[*420] *It was then strongly contended on the part of the executors that they should at least be permitted to proceed in their action at law against the executors of Mr. Rigby, to ascertain how much they should be permitted to recover at law upon the bond of indemnity, for which (as they insisted) they must be admitted as creditors under the decree.

But the LORD CHANCELLOR would not make any order as to this; and said it was by no means true that a creditor coming in under a decree was necessarily to be admitted to prove to the full extent of what he might recover at law; for it was the settled practice in this Court not to allow to such a creditor any thing which would be given to him at law in the shape of damages, and therefore though it was of course for a jury to give interest on a promissory note, under the name of damages, yet such a creditor was never allowed interest under a decree of this Court.

And his Lordship over-ruled the exception, and divided the deposit.

IRESON *v.* DENN.†

(2 Cox, 425—426.)

1796.

Mich. Term.

Rolls Court.

ARDEN, M.R.

[425]

A purchaser of an equity of redemption filed his bill against the mortgagee to redeem. The original mortgagor having made a mortgage of other premises to the same mortgagee for a distinct debt, the purchaser cannot redeem the first, without redeeming the second mortgage. And the parties interested in the equity of redemption of the second mortgage are necessary parties to the suit.

BILL by the purchaser of the equity of redemption against the mortgagee, to redeem.

Defendant by his answer, stated a subsequent mortgage made to him by the same mortgagor of distinct premises and for a distinct debt; and insisted that the plaintiff had no right to redeem the first mortgage without redeeming the second.

And his Honour said he did not know why such a rule was ever laid down, but that it had been decided by many cases, that a mortgagee of two distinct estates upon distinct transactions from the same mortgagor was entitled to hold both, even against the purchaser of the equity of *redemption of one of the mortgaged estates, without notice of the other mortgage, until payment of the whole money due on both mortgages. And his Honour thought the persons interested in the equity of redemption of the second mortgage were necessary parties to this suit; and directed the cause to stand over to make these parties accordingly.—Reg. Lib. A. 1796, fol. 899.

[*426]

† *Jennings v. Jordan* (1881), 6 Ap. Ca. 698, 717, 51 L. J. Ch. 129.

1797.

May 31.

Rolls Court.

ARDEN, M.R.

[429].

BARR *v.* CARTER.†

(2 Cox, 429—431.)

B., a married woman, made a will, merely executing a power given her by the marriage settlement, but she appointed C. executrix generally. The Ecclesiastical Court granted probate of this will in the general form. B. was the sole executrix of her late husband A. The general probate of the will of B. will transmit to C. the representation of A. without an administration *de bonis non*.

THOMAS HAWLEY made his will, and appointed his wife Elizabeth sole executrix and residuary legatee.

[*430] Elizabeth Hawley proved the will, and then married Samuel Chapman, and on that marriage a settlement was *made, whereby a power was given to Elizabeth to dispose by will of a sum of 700*l.* S. S. annuities.

Elizabeth died in the lifetime of Samuel Chapman. She made a will which recited the power, and in pursuance thereof she disposed of the 700*l.* S. S. annuities. This was the whole of the will, but at the end she appointed Elizabeth Carter sole executrix of that her will.

The Ecclesiastical Court granted probate of this will to the said Elizabeth Carter in the usual general form, granting administration “of all and singular the goods, chattels, and credits of the deceased,” &c.

This bill was filed by a legatee of Thomas Hawley, for payment of his legacy out of assets, and made Elizabeth Carter a defendant, as being the personal representative of Thomas Hawley.

Elizabeth Carter by her answer, insisted that she was not the personal representative of Thomas Hawley, for that as Elizabeth Chapman was a *feme covert*, and made her will only in pursuance of the said power, the probate of such a will did not transmit to Elizabeth Carter the general representation of Thomas Hawley, but that there ought to have been before the Court an administrator *de bonis non* of Thomas Hawley.

The plaintiff, however, brought on the cause to be heard without any such administrator, and now on the hearing the objection was made for want of parties.

† *Smart v. Tranter* (1890), 43 Ch. D. 587, 59 L. J. Ch. 363.

MASTER OF THE ROLLS :

1797.
BARR
C.
CARTER.

A *feme covert*, with the consent of her husband, may make a complete will of personal estate, and may appoint a general executor, who will in that case be the general representative not only of the *feme covert*, but of any testator of whose will the *feme covert* was executrix. The only question is, whether this is to be considered as a general or a limited probate.

Mr. Romilly :

The will recites the power, and does nothing more than execute it. Then the appointment of the executor must be necessarily limited to that which is the only subject of the will.

His Honour however, after some consideration, thought that the general terms of the probate must make Elizabeth Carter a general representative. [431]

And the cause proceeded.

1790.

June 14.THURLOW,
L.C.

[171]

BUTRICKE v. BROADHURST.†

(1 Vesey Jr. 171—173.)

Husband devised all his real and personal estates in trust for his wife for life, provided she should not marry; and made her executrix. The trustees not acting, she took possession. After receiving rents and profits for five years not allowed to elect to take a sum under marriage settlement, without special ground, as that from the situation of the property it was doubtful, what would be the result.

Party having right of election may file a bill to have property cleared in order to elect to advantage.

[*172]

PLAINTIFF'S husband by his will, of which she was sole executrix, gave all his estates both real and personal to trustees upon trust to permit her to receive the rents and profits *for life, provided she did not marry again. She proved the will. The trustees never acted; and she received the rents and profits for five years after his death; and then filed a bill, claiming to elect to take an interest in a trust fund of 2,000*l.* under her marriage settlement instead of the estate under the will.

Solicitor-General, for plaintiff:

She might, if called upon, have made her election. She received the rents and profits, because there was nobody else to take any care of them. If the bill had been filed against her, the trustees taking no care of the interests of *cestuis que trust*, it would have been competent for her to say, she only meant to perform the office of executrix, and received the rents and profits, because nobody else would; and that she was ready to account according to the will; that is, claiming the rents and profits herself for life; or upon the other hand, that nothing was done, but acts of necessity; and that she might elect. I cannot find a case, except that upon the will of the Duke of Montague, *Lord Beaulieu v. Lord Cardigan*, Amb. 538, and in Browne's Parliamentary Cases; and in that case the acts were very various, and more in number than in this. Supposing there was no real estate, no more evidence arises from her possessing herself of the interest of the personal property, than of the principal; as, being executrix, she must have received the interest in order to

† Discussed in *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 637, 41 L. J. Ch. 74.

account for it ; and she could not without a decree have given any to the devisees over ; for by the will they could have nothing until her decease or marriage.

1790.
BUTTRICK
v.
BROAD-
HURST.

LORD CHANCELLOR :

I thought Lord NORTHINGTON tolerably well founded in that case ; but it was determined otherwise in the House of Lords ; who decided, that the right of election lasted fifty years. But all that was determined by it, was, that under circumstances it may last, till the whole affair is wound up, and the trusts executed. I agree now, that if the plaintiff had filed a bill, stating that she did not know the state of the fund ; and desiring to have the debt and legacies paid, and the property cleared, that she might elect to advantage, she might have done so. So if the other parties had filed a bill, it could only have been to *force her to make her election, but her having taken possession under the will, and the estate being a free fund from the beginning, I cannot think of a principle upon which the Court can say she is now competent to elect. The bill must be dismissed, but I wish it to be understood that it turns upon the particular circumstance that the bill was filed without any ground and no suggestion that the real or personal estate is in such a situation as to render it doubtful what the result would be. She consequently has laid no ground that entitles her to elect after enjoyment for five years.

[*173]

COUNTESS OF SHREWSBURY v. EARL OF
SHREWSBURY.†

(1 Vesey Jr. 227—234.)

1790.
July 19.
THURLOW,
L.C.
[227]

Tenant in tail restrained as to alienation, but with powers of leasing and jointuring as in case of tenant for life, considered as tenant for life, and therefore his personal representative a creditor for a charge on the estate paid by him.

THE late Earl of Shrewsbury, under a remainder in a settlement made 1718, and an act of parliament 6th Geo. I. 1720, for

† *In re Pride, Shackell v. Alnett* (1891), 2 Ch. 142.

1790.
 COUNTESS OF
 SHREWSBURY
 v.
 EARL OF
 SHREWS-
 BURY.

the purpose of enabling the parties, who were Papists, to take under the settlement, which was confirmed by the act in every particular, became tenant in tail in possession upon his father's death, subject to a charge of 15,000*l.* for the portions for his sisters, Mary, afterwards Lady Dormer, Barbara, afterwards Lady Aston, and Lucy Talbot, under a power in the settlement to charge part of the premises by a term of 99 years to raise that sum from rents and profits, or by sale and mortgage; if only one daughter, to her; if more than one, equally to be divided among them, share and share alike, payable at twenty-one, or marriage, with maintenance at 5 per cent. from the rents and profits. This power was executed by the father about the year 1733 by indenture between him, Lord Fitzwilliam and Mr. Pitt, conveying to them various premises in trust for 99 years for that purpose. By a clause in the act of parliament it was provided, that no person taking under that settlement (under which all the limitations were in tail) should alien any part of the hereditaments so settled, or do any other act to disinherit any person in remainder, unless he should conform to the established religion, and take the oaths within six months after he should have attained the age of eighteen years; and that all such acts, alienations, fines, recoveries, &c. should be void in respect to those in remainder. Powers of jointure and leasing were given, with restrictions usual upon tenants for life, to all taking under the settlement. In 1742 upon the marriage of Barbara with Lord Aston, the late Earl with his own money paid 5,000*l.* being her full share of the sum charged by the settlement; and received from her a release to him and his heirs in respect of it. In 1751 he paid to Mary Lady Dormer upon her marriage part of her share; and the remainder, and Lucy Talbot's share to her, afterwards, at what time did not appear, but supposed to have been, when the latter was of age, in 1753. He never took any assignment of the term: nor was there any declaration of *trust upon his so paying off this charge. In 1751 by deed, reciting, that he was seised of the freehold subject to this charge, and that he had discharged Lady Aston in full, and some part of Lady Dormer's share, and that, as none of these sums had been raised under the term, he had a right to have them raised for

himself ; he in consideration of 1,000*l.* conveyed to Robinson for a term of forty years an advowson, part of the premises comprised in the term ; and the trustees consented, and were parties, upon condition that the consideration, viz. 1,000*l.* should go in discharge of so much of this sum of 15,000*l.* He died in 1787 ; leaving a will, dated in 1749 ; but without taking any notice of his right to be reimbursed this sum, which he had discharged, or doing any other act, by which his intention could be known. The bill was filed by his widow (who was provided for by a jointure) as his administratrix with the will annexed, and sole personal representative, against Lord Shrewsbury nephew of the late Earl, and tenant in tail, in the same manner restrained as to alienation as the late Earl was, and against the trustees of the term, praying that they might be compelled to raise by sale or mortgage, or out of the issues and profits, or otherwise as the Court should direct, such sums * as were paid by the late Earl to his sisters, or their husbands, in satisfaction of their shares of the sum of 15,000*l.*

1790.
COUNTESS OF
SHEWSEBURY
v.
EARL OF
SHEWSEBURY.

The LORD CHANCELLOR decreed † for the plaintiff ; and the cause came on again upon the petition of the defendants for a re-hearing.

Solicitor-General, Mr. Mitford, and Mr. Richards, for the plaintiff :

The first question is, whether the late Earl was, or his representatives since his death are, entitled to have this sum raised. Upon the proviso in the act of parliament your Lordship was induced to think, that the late Earl, though tenant in tail, stood as to the point in discussion exactly in the situation of tenant for life. * * The rule is, that where the owner of the inheritance pays off an incumbrance, his personal representative shall claim nothing against the heir ; as it is the case of the owner of the estate paying off his own debt. Tenant in tail has been considered in the same way ; namely that he paid it off for the benefit of the estate ; as he could make himself master of

[229]

* They only went for the remaining 14,000*l.* after deducting the 1,000*l.* paid in 1751.
† 3 Bro. Ch. Ca. 120.

1790.
 COUNTESS OF
 SHREWSBURY
 v.
 EARL OF
 SHREWS-
 BURY.

the estate ; which raises a presumption, that he meant to pay it off for the benefit of the inheritance ; with this difference, that he may give indications of his intention to keep the charge alive ; which will place him in the same situation, in which the Court considers tenant for life to stand. But the same inference cannot be presumed for tenant for life ; as it would be paying it off for the benefit of other persons. *Kirkham v. Smith*, 1 Ves. Sen. 258. * * Another point, stated by the petition, but not made before, is, that, if Lady Shrewsbury is entitled to call for this charge, it ought to be apportioned as between the late Earl's enjoyment of the estate, and the future enjoyment of it *during the remainder of the 99 years term. * * *

[*230]

Mr. Mansfield, Mr. Graham, and Mr. Lloyd for the defendant. * * *

[231] Here there is an acquiescence by Lord Shrewsbury from 1742 to 1787 ; the length of time affords a strong ground for presuming, that he meant to pay it off for the estate. To this presumption add the release instead of the assignment, and the nature of the conveyance of 1751 ; also the circumstance that Lord Shrewsbury might have looked at the limitations here, and seen, that no one of his descendants was ever to be owner of the estate, unless he should change his religion ; but that the estate was unalienably annexed to his family, to whom it was natural for a person of his rank to wish the estate to descend free from burthen. The difference, when the remainder is limited to a stranger, and when to his own family, makes the presumption much stronger in the one case, than in the other ; and here it is exactly, as he would have limited it himself. * * As to

[232] the second point it would be very inequitable to charge the whole principal upon the remainder of the term. The term is to take from the rents and profits, or by sale or mortgage ; they had a right to make a mortgage ; but it was formerly the habit of the Court to make tenant for life in this way pay part of the principal.

[Mr. Lloyd cited some old cases in which the tenant for life was compelled to bear part of a capital charge.]

*LORD CHANCELLOR :

I have no doubt upon either point. As to the first, it has been the wisdom of the administration of justice in this country in order to introduce some degree of certainty to lay down this rule; that the act of tenant for life in paying off a charge upon the estate shall *primâ facie* be intended to make him a creditor. From the moment that is laid down, as far as this case is concerned, there can be no doubt of that intention; it is rather fortified than diminished by what followed; for though it is true, that in 1742 an instrument was given, and accepted, purporting to be a discharge of the estate absolutely, yet that cannot be raised higher than as matter of evidence; for where without question he had expressed a contrary intention, the instrument itself would not have operated as a discharge. Therefore, as far as that, it might be a fair ground to infer, that he did intend to discharge the inheritance. But in a subsequent part, in a transaction between the trustees, the *cestuis que trust*, and every one entitled, there is in the recital a perfect and distinct recognition, that the circumstance of paying it off did make him a creditor; and it was recited for the very purpose of discharging him *eo nomine*. He took 1,000*l.* in respect of a lease of part of the premises; and the recital, that he was entitled to the whole, was only in discharge of that title as to that part. After that it was impossible to contend, that this was not considered and treated as a charge. The *true ground of the inference in favour of tenant for life paying off an incumbrance is the scantiness of his estate; for he cannot be intended *primâ facie* to discharge it, because it would be discharging the estate of another person; and certainly he does so just as effectually and totally, where he discharges an estate, that goes on unalienably in one direction, as, when it is to be alienable; therefore in that point of view the inference arises as much in one case as the other. With respect to the other question, where the term is very short, it certainly does bring on that inconvenience, which must have come on in some period, if the term had been longer. If you carry it to 200 or 300 years, and there is an entail, it will fall upon those, who may make the estate absolutely their own; but here that cannot be done. As to that inconvenience, I cannot

1790.

COUNTESS OF
SHREWSBURY
v.
EARL OF
SHREWS-
BURY.

[*233]

[*234]

1790.
 COUNTESS OF
 SHREWSBURY
 v.
 EARL OF
 SHREWS-
 BURY.

break through the general rule upon that account. If this was intended, it must be more express. Suppose, it had been provided, that the sum should be raised by instalments out of the rents and profits; it might have been easily arranged, if that had been the intention: but there was no such intention. Here it is expressly provided, that the trustees may raise by mortgage; and if a term was created to raise by the rents and profits, I should say, it might be done by sale or mortgage. Suppose they had raised it by mortgage; the mortgagee would have held it as long as there was sufficient left to pay him his money; and then it would have been wise in him to sell it for fear of losing part of his principal; it would be at his peril to let it rest so long as not to leave sufficient to pay him his principal. As to those cases cited by Mr. Lloyd; there must be some mistake in them; they are very short, and could not have been understood. They could not have ended there; for if so, no justice could have been done between the parties.

Affirm the decree.

1791.
 March 17.
 THURLOW,
 L.C.
 [285]

STRATTON v. BEST.

(1 Vesey Jr. 285—286.)

Election to take under or in opposition to a will can only be compelled upon something in the will, not *dehors*.

JOHN LIGHT in 1764 suffered a recovery of the manor of B——; though in fact he was entitled only to a part of it. He afterwards made a will, devising in general terms all his real and personal estate to trustees, &c.

Mr. Mitford, for infants, made a question, whether as testator supposed himself entitled to the whole manor, which was proved by the evidence, that was not sufficient to put legatees to election.

LORD CHANCELLOR :

I think, testator did at the time of the recovery suffered consider himself as having a power to dispose of the whole estate;

but can I construe it so, unless there is something in the will to shew it? Suppose White-acre and Black-acre; and that testator has a disposing power over one, and not over the other; can the Court admit evidence *dehors* the will to shew testator's conceit about it? I admit, you have proved, that in 1764, when the recovery was suffered, he took himself to be master of the whole. I have no doubt, but that, if he had been asked, when he made his will, whether he did not mean the whole, he would have said, yes: and, if desired to put in a description of it, he would have done so: that I believe upon the evidence, you have brought. But to do this I must say, that evidence *dehors* the will of testator's opinion at any time may be produced; and I do not think, that is the law of the Court. All the argument in *Noys v. Mordaunt** and the whole suite of cases upon this subject have turned upon the expressions of the will. If I was to *receive evidence of the testator's fancy, it would introduce a very desperate rule of property in this Court.

1791.
STRATTON
c.
BEST.

[*286]

EVEREST v. GELL.

(1 Vesey Jr. 286.)

Interest of residue of personal estate, given by will to a woman for life, then the residue to her nieces, if they die without issue, over: the last limitation over is too remote; and on death of the aunt the nieces take the whole.

1791.
March 22.
THURLOW,
L.C.
[286]

TESTATOR directed the interest of the residue of his estate, which was all personal, to be paid to Mary Read for life; and then gave the residue to her two nieces; "but if they die without issue," over. On the death of the aunt one of the nieces and her husband brought the bill on the ground of the remoteness of the limitation over, praying that Plaintiffs and the other niece might be declared entitled to the whole. The accounts were directed; and upon farther directions after the report the reserved question was, whether the limitation over upon the event of the death of the nieces without issue was too remote.

* 2 Vern. 581.

1791.

EVERETT
v.
GELL.*Mr. King* for the limitation over :

The Court will go, as far as they can, in favour of the limitation over, if they can see any intention to confine the words to dying without issue at the time of the death: *Doe v. Lyde*, 1 Term Rep. B. R. 593.

LORD CHANCELLOR :

Was at first inclined to think this the same sort of case as *Forth v. Chapman*, 1 P. Will. 663, and asked, what the words were in that case.

Mr. Lloyd said, the words there were "leaving no issue."

It was admitted, that there did not seem to be any thing in this will to shew, testator meant dying without issue at the time of the death.

LORD CHANCELLOR :

All, that was determined in *Doe v. Lyde*, was, that the Court would not imply an estate tail. The nieces must be declared entitled to the whole.

1791.

May 13 & 17.

THURLOW,
L.C.
[299]

BOYLE v. BISHOP OF PETERBOROUGH.*

(1 Vesey Jr. 299—310.)

Devise of personal estate for life, then among all children of devisee in such shares and manner, for such interests, with such survivorship, and to vest at such time, as devisee for life should by deed or will appoint: in default of appointment of the whole or part, equally, if but one, to that one, payable at twenty-one; nevertheless the shares of any attaining twenty-one in life of devisee for life to be vested; but payment to be postponed till her death: that clause, vesting an interest at twenty-one, held to relate only to the case of default of appointment; and one of two children being dead without issue after twenty-one, and without receiving any share, that circumstance will not prevent an appointment of the whole fund to the survivor. An illusory share may be accounted for by circumstances. Trustee to appoint cannot appropriate part of the sum appointed to himself; but may recal it into the original fund.

IN 1776 after the marriage of Robert Boyle Walsingham 5,000*l.* to which Charlotte Boyle Walsingham his wife was

* *Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 269, 59 L. J. Ch. 717.

entitled under her mother's settlement, was vested in trustees upon trust for the husband for life, then for the wife for life, and after the decease of the survivor for all and every the child and children of the marriage in such shares and proportions, and in such manner and form, and to vest at such time, as the husband and wife or the survivor should by any deed or deeds, writing or writings, signed by two credible witnesses, or by will, direct, limit, or appoint; and in default of appointment, and as to so much as should remain unappointed, to all equally, to vest in the sons at 21, in the daughters at 21 or marriage, subject to the interest of the husband and wife for their lives. By the will of Lady Kildare two other sums, viz. 4,000 and 8,000*l.* were vested in trustees for the same uses, and subject to the same power of appointment.

1791.
BOYLE
C.
BISHOP OF
PETERBORO'.

In 1770 Lady Frances Coningsby devised all the residue of her personal estate upon trust to permit her daughter Charlotte Boyle Walsingham to receive the dividends and interest during her life for her separate use; and immediately after her decease to transfer the whole residue to and among all and every the child and children of her said daughter, if more than one, in such shares and proportions, and in such manner, for such interests, with such benefit of survivorship, and to vest at such time, as her daughter should by any deed or deeds, writing or writings, signed by two credible witnesses, or by her last will and testament, notwithstanding any present or future coverture, direct, limit, or appoint: and in default of appointment, and as to so much as should remain unappointed, upon trust for all and every the children of her said daughter, if more than one, in equal shares payable at 21, the shares of any dying under that age to go to the survivors; if but one, then for such only child, payable at 21; nevertheless, if any of the children of her daughter should attain 21 in the life of their mother, the shares of those so attaining that age were to be considered as vested *interests, and transmissible to their executors; but payment to be postponed till after the decease of their mother. Lady Frances Coningsby died in 1781 leaving her daughter Mrs. Walsingham a widow with two infant children, Richard O'Brien Boyle and Miss Boyle. In May, 1783, Mr. Walsingham being

[*300]

1791.

BOYLE

v.

BISHOP OF
PETERBORO'.

dead without having executed his power, Mrs. Walsingham by deed poll reciting her power under Lady Frances Coningsby's will, and properly executed according to it, gave to her son 4,500*l.* stock, part of the fund bequeathed by that will, for the purpose of advancing him in the army; with a proviso, that nothing therein should extend to annul her power of appointment as to the remaining part of that fund; and also that, if she should die without making any appointment of the remaining part, that stock so given to her son should be accepted by him as a part of his share of that fund. The sale of that stock produced about 3,800*l.* which was applied to the purchase of a commission in the army for the son; and by deed poll in August, 1783, in which year the son came of age, he declared, that it was applied in part of his share in the fund bequeathed by Lady Frances Coningsby in case of no future appointment. By a subsequent deed it was declared, that it had been recollected, that though the whole sum, arising from the sale of the stock appointed for the son, was in the first instance applied for his promotion, it was so applied under a condition, that the money arising from the sale of his former commission should be applied to replacing, as far as it would go, the stock sold. That sum amounting to 817*l.* was accordingly so applied, and made part of the securities; consequently the sum advanced to the son was reduced to 3,000*l.* Richard O'Brien Boyle died before any other appointment, leaving a will, by which, reciting that he was entitled to a real estate in Essex, and to the reversion of one moiety at least of the residue of his grandmother's personal estate after the death of his mother, he devised the real estate and the reversionary share of that personal fund to his executors upon trust to sell the real, and to pay his debts with the produce; and, if that was not sufficient, to apply so much of the personal as would make up the deficiency. He then directed them to discharge a particular debt of 500 guineas, and gave several legacies; and then gave the rest to them in trust to pay the interest to his sister for her separate use, till she should have a child or children, who should attain 21; the principal equally to be divided among all her children, payable at 21, or within six *months after; but his sister to enjoy their shares

during their respective minorities ; and if she should die without leaving issue living at the time of her death, then for Lord Shannon absolutely. He also devised a real estate in Ireland in trust for his sister and her children, remainder to Lord Shannon. In 1789 Mrs. Walsingham by deed poll reciting the death of her son without issue, leaving his sister surviving him, then under age, and an only child ; and reciting her desire to execute her power in favour of her daughter and such other issue, as she might afterwards have ; appointed the trustees to be possessed of a fund of 60,071*l.* and all the other securities, over which she had a power of appointment, except a fund of 10,000*l.* upon trust, subject to the interest to herself for life, for Miss Boyle and all other children, she might afterwards have, according to her appointment by deed with or without power of revocation, or by will ; and in default of such appointment, in trust for Miss Boyle, her executors, administrators, and assigns, to be vested in her subject to the appointment, or, in default of appointment, from the execution of that deed ; provided, that nothing in it should extend to make void her power of appointment over the part remaining unappointed. Soon after in the same year she appointed the remaining 10,000*l.* in the same manner. In 1790 Mrs. Walsingham died, leaving Miss Boyle her only child and sole executrix.

Miss Boyle brought the bill, to have the benefit of these appointments by her mother, against the trustees, who refused to transfer on account of the claims of the executors of her brother under his will. There were three questions: 1st, whether Mrs. Walsingham's power of appointment was not gone by the death of her son, and consequently whether the subsequent appointments were not void: 2ndly, whether any interest vested in the son at 21; and to what extent: 3rdly, whether the appointment to the son was not illusory.

Solicitor-General, Mr. Mitford, and Mr. King, for plaintiff:

As to the will of Lady Coningsby, the declaration, that the shares shall vest at 21, only applies to the case of no appointment, or an incomplete appointment. After the appointment to the son Mrs. Walsingham had by the power, she reserved to her-

1791.

BOYLE

v.
BISHOP OF
PETERBORO'.

1791.

BOYLE

c.

BISHOP OF
PETERBORO'.

[*302]

self over the remainder, precisely the same power over that, as she had before over the whole; which power continued after her son's death. A share was given to him in *his life; and, if not, it cannot be contended, that, if she had, while both were living, a power of executing this appointment, if she had thought proper, by giving to them in moieties, the whole to go to the survivor if either should die without issue, which power in her cannot be disputed, the accident of her son's death, before she made the appointment, could prevent her from making such an appointment, as would have the same effect, as that appointment would have had in that event. * * Upon the death of her son the only proper object of her bounty was her daughter; and if she could have made such an appointment, as would in the event have given the whole to her daughter, there is no reason for saying, such an appointment, as she has made, is void, because a person, who is dead and no longer an object, was the person, who if living could have disputed it.

[304]

Attorney-General, for Lord Mulgrave, Lord Fitzgibbon, and Mr. Phipps, executors of Richard O'Brien Boyle:

The clause, which vests the interest at 21, is different from that, which precedes it; which looks only to the case of no appointment, or an incomplete appointment; but the latter respects the whole; and directs, that it shall vest even in the life of the mother, and be transmissible, even if they die before her. * * The fund is between 70,000*l.* and 80,000*l.* So small a share, as was advanced to the son, has always been looked upon as illusory with regard to so large a property. It would be so, if he had lived: and if so, his representatives are entitled to what he would have been entitled to.

[306]

Mr. Hardinge and *Mr. Hollist*, for Lord Shannon claiming in remainder under the will of Richard O'Brien Boyle:

First: if Mrs. Walsingham had a power of appointment after her son's death, which I deny, it must have reference to the idea of a distribution as between two living children; and what in that view she has done is illusory. Secondly: all power of appointment was gone after the death of the son: or, in other words,

there accrued to him at 21 a vested interest in a moiety of the unappointed residue, subject only to a reasonable appointment to be made by his mother in his life; but absolute, *in case of his death before any appointment. * * *

1791.
BOYLE
BISHOP OF
PETERBORO'.
[*307]

Solicitor-General in reply was stopped by the Court.

[308]

LORD CHANCELLOR:

There is no case, that I recollect, like this in point of circumstances. There are two questions. First consider, what would be the operation of such a power without the special words here. The great difficulty is to settle, what the law would be, where there is no such peculiarity of an interest vesting in the life of tenant for life. It strikes me, that if a sum is given to be enjoyed by A. for life, with power of appointment during life, and after his death for want of appointment to be *enjoyed by five persons, naming them, it is not a vested interest in any of them till the death of the tenant for life. I think, the reason of the thing, the construction of the instruments, and the authority of the cases cited, concur to this; that a fund given in this manner does not by the form of the gift vest, her power subsisting upon it; and if not, except for that phrase it would not at all. Then the question is as to the effect and operation of that clause; and whether the phrase will alter, what would be the general effect in any other case. If any interest vested, it must be *modo et formâ* as provided; that is in aliquot parts; and then the power is gone. Suppose there had been more children; and one after having attained 21 had died; shall the power remain as to the other children; or, if that interest vested in certain aliquot parts, will not all of them be vested? If so, then I must consider this, as if there were more children; and then say, that the aliquot parts vested in all; and that circumstance destroys the power. The form of it is, if no appointment, and for so much as is not completely appointed, to assign to all and every the children, if more than one payable at 21; if but one, then to that one, payable at 21. If it had stopped there, I must have looked upon it to be a provision at 21 after the death of the mother. But it goes on by directing, that if any such child shall

[*309]

1791.

BOYLE

v.
BISHOP OF
PETERBORO'.

attain 21 in the life of the mother, his or her share shall be considered as a vested interest, &c. I think, that must relate to unappointed shares ; and the effect of that phrase is not to bind the shares to be appointed ; not to say they should vest at 21 ; because the power, being during life, would itself specify, when they were to vest ; and they might at any period of life without waiting for that period ; for there was no limitation upon her appointment ; and her children need not be 21, when they were appointees ; therefore I think, this was intended to vest an interest only in default of appointment. That brings it to the question, whether the power has not lost its opportunity of being exercised by the death of the son ; or whether there is a capacity of appointing, where only one child is left ; and, if at all, whether it must not be with reference to the clause, which provides for its going in case of no appointment. The words breed the doubt. Where there are only two children, the power by way of exercise of discretion is totally gone by the death of one, before it is exercised ; and it cannot be the same power in point of extent, as when meant to be a distribution among several ; for which it *is necessary, there should be several. But this clause made it proper for her to express, that she did intend her power to be executed. If there was no appointment, the consequence is, each would be entitled to a moiety, because there was no appointment. In respect of that clause she had a power to appoint to one only ; for, though that is not a distribution, it is an expression, that it shall go by appointment, and not transmit for want of it. I think, the extent of her power is such as to enable her to express her intention : that she has done ; and therefore it must go according to the intent. As to the point of illusion : supposing the argument good, that she had a right to make any appointment not illusory, it is difficult to say, that, when her son died without leaving any object, it could be illusory to give him no more than the sum, that was advanced : I do not know, how that could be argued. I agree, that, where there is gross inequality, and nothing more, that will do : but, where it is accounted for, and by the situation of the children is rendered humane, and wise, and discreet, the Court will not call it illusory ; for that is fraud. As to the sum repaid by the son :

[*310]

the effect of the instrument is to recall that sum into the estate of the testatrix, not to appropriate it to herself. It is not objected, that she made a bargain to get part of that fund for herself, but only that if the commission cost less, so much should return to the fund, and be liable to her appointment as before. Being drawn back into the fund to be distributable as before, if it had been duly distributable afterwards to other children, you could have made nothing of it. It only lessens the sum originally appointed, and puts the argument as to illusion in a stronger point of view. If a trustee with regard to appointment will appoint upon condition of being paid for it into his own pocket, it is void, because corrupt: but if he draws it back into the original fund, it only lessens the appointment. But I say little upon the point of illusion; because I do not think it was necessary for her to make any appointment at all to the son. As the case has happened, she need not have given him a shilling contrary to her purpose, that the whole should go to one; meaning to say, she had as much right to fix it in one surviving, as in nine, if nine had survived: upon that idea I think the plaintiff must prevail.

1791.
BOYLE
v.
BISHOP OF
PETERBORO'.

HUTCHEON v. MANNINGTON.†

(1 Vesey Jr. 366—368.)

Legacy out of a fund in the East Indies, given over in case of death of legatee before he might have received it, vested from death of testator.

Interest of legacies to be computed from a year after testator's death; unless some other time appointed by testator: but he cannot make executor answer interest beyond what the law has done.

Estate devised on trust to be sold with all possible diligence or in reasonable time, considered as sold from testator's death.

1791.
July 12.
THURLOW.
L. C.
[366]

HUTCHEON, jun. in 1781 by will reciting, that all his fortune was entirely of his own acquiring, consisting of about 8,627*l.* and was all vested in securities in the East Indies, gave several legacies, some absolutely, but most of them were distinct legacies to several of his brothers and sisters for the proper use and

† *Bubb v. Padwick* (1880), 13 Ch. D. 517, 49 L. J. Ch. 178; *Chaston v. Seago* (1881), 18 Ch. D. 218, 50 L. J. Ch. 716.

1791.
HUTCHESON
v.
MANNING-
TON.

benefit of each legatee, with a clause to each ; directing that if the legatee should die, before he or she " may have received the legacy," it should go to the children of the legatee equally, share and share alike, and in default of issue among the other brothers and sisters. Then reciting how much these legacies would amount to he gave the residue, after having calculated the amount of it, to his father for his own proper use and benefit ; " but in case of his death before he may have received the rest and residue of my estate before mentioned," he gave it over to his brothers and sisters before mentioned and their children. He made the defendant executor, and died very soon after making the will. His father died in 1784 without having received any part of the residue. The bill was brought by the brothers and sisters of the testator, to whom the residue was given over, claiming it upon the event of the father's death, before he received it.

Solicitor-General, for plaintiffs :

The meaning of the testator must be this, and was suggested to him by his situation, that of his relations here, and the property. He seems to have recollected, that the property must be sent over ; and did not mean to vest any interest in his relations here, merely because they might happen to survive him ; but if they did not live to receive it, he intended to substitute other persons to take it. It is impossible, he could mean the same thing, as if he had said, " I give it in case of their surviving me." Suppose it was a real estate devised upon trust to sell with all possible diligence, or in a reasonable time ; the Court would enquire into that, and make the executors pay costs, if they did not follow the directions. So in this case *there ought to be an inquiry, within what time he might have received it. The plaintiffs say, the estate could not be got in India before the father's death.

[*367]

LORD CHANCELLOR :

I cannot find any topic of argument to reason this upon. Suppose any of these legatees had died within a year after the testator, there might then have been some ground for saying,

that the testator alluded to the known practice of the Court to compute interest upon legacies from a year after the death of the testator. I rather believe, he had some such purpose, as you attribute to him, in his contemplation. There is a faint indication of a purpose, that there shall be some time or other, when these interests shall go over, and that they shall not vest in the meantime. But has he conceived that intention, and expressed it with such definite certainty, that I can act upon it? I am to compute, what time would be sufficient to enable these parties to receive their legacies. It is all too uncertain. Suppose they lived, and claimed their legacies: they must have been computed with interest from a year after the death of the testator, if no other time was appointed. If he had given any time, I agree, that the intention is to prevail, if it can be found out; (though a testator cannot make an executor answerable for interest, beyond what the law has done) but he must give me some rule to go by. Suppose he had given a real estate in the manner you specify; it is clear, that it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness: in some way it may be sold immediately: but I should not inquire, when a real estate might have been sold with all possible diligence; for it might be the very next day or that very evening; and therefore the Court always in such a case considers it as sold the moment the testator is dead; for where there is a trust, that is always considered here as done, which is ordered to be done; and the Court cannot measure the time. Suppose this property had been in the West Indies instead of the East, it would have required less time to be remitted; still less if in Jersey or Cumberland; and if only 100 miles off, it would have cost a journey of two days at least. In this case it is an immeasurable purpose. I can do nothing with it; and it must be considered as vested from the death of the testator.

1791.
HUTCHESON
v.
MANNING-
TON.

The next day the *Solicitor-General* obtained leave to mention this case again at the sittings after term upon suggestion, that he did not think, justice was done by the decree.

[368]

On the 20th it came on again: and the *Solicitor-General*

1791.
HUTCHESON
v.
MANNING-
TON.

desired, it might stand over farther, as an agreement between the parties relative to the fund in question had been since discovered, which might make it necessary to file a supplemental bill. All parties consenting it was ordered to stand over.

Upon the 27th of January, 1792, it came on; and the Plaintiffs submitting to the opinion of the Court in the decree rested entirely upon the agreement, which had taken place upon disputes among the family, whether, if any legatee should die before the legacy was received, it should go over.

Upon that agreement the LORD CHANCELLOR said, the relief prayed was all of course.

KIDNEY v. COUSSMAKER.

WILLIAMS v. COUSSMAKER.

(1 Vesey Jr. 436—447.)

1792.
March 6.
THURLOW
L.C.

[436]

Where a testator forms a mixed fund of real and personal estate by a direction that the real estate shall be sold, and that the surplus proceeds shall go with and be considered part of his residuary personal estate, such surplus proceeds are charged with the payment of his debts and (semble) with all other payments to which the personal estate is liable.

Note.—The trustees of the real estate were also the executors.

BENJAMIN KIDNEY by his will, after giving directions as to his funeral, and the erection of a monument, gave, devised, and bequeathed, certain estates in the counties of Northampton, Bedford, Huntingdon, and Leicester, and in London, and all other his messuages, lands, tenements, and hereditaments, in the said several counties of Northampton, Bedford, Huntingdon, Leicester, or elsewhere, in Great Britain, except the estates hereinafter given to his wife for life, to the use of trustees, their heirs and assigns for ever, upon the trusts aftermentioned, viz. : upon trust to sell and dispose of the produce to such person and persons, and in such manner, as after mentioned; first, to discharge “all principal money and interest due and owing to any person or persons for and upon any mortgages or incumbrances subsisting upon and particularly affecting the same estates at the time of my decease, as the same estates are thereby

severally charged and chargeable; and shall and do place out and invest all the overplus of the money arising by such sale or sales *as aforesaid after deducting their charges in the execution of the aforesaid trusts in government securities or in any of the public funds in their names, &c. in trust for such person and persons, in such proportions, and in such manner and form in all respects, as I have hereinafter directed of and concerning the residue of my personal estate; it being my intent and meaning, that such overplus money shall go with and be considered as part of the residue and surplus of my personal estate." The testator then recited, that under the will of Sir R. K. he and William Nutt had a sum of 1,000*l.* another of 700*l.* and another of 500*l.* in trust to be laid out in government securities, and that the dividends should be paid to three persons respectively for their lives, and that after the decease of each respectively the principal should be considered as part of that testator's personal estate. Then taking notice, that those sums were not so laid out, but that he had paid interest at 4 per cent. to the annuitants in respect of them, he directed his executors, as soon as conveniently could be after his decease, to raise out of his personal estate those three sums, and to invest them in government securities for the uses of Sir R. K.'s will. The testator then confirmed the settlement made on his marriage with his wife Elizabeth; and ratified and confirmed to her all sum and sums of money given or bequeathed by relations or friends, which is, are, or shall be, invested in the public funds, or laid out upon any security in her own name, or in the names or name of him and his wife, or of any person or persons in trust for her. He then gave several messuages to his wife for life, and if they fall short of producing annually 400*l.* directed, that "the deficiency if any shall be made up to her out of the interest, dividends, and produce of my personal estate; it being my will and meaning, that my wife shall always have and be entitled unto an annual income of not less than 400*l.* for her life, to be issuing and payable as aforesaid:" if the rents, &c. exceed 400*l.*, his wife to be entitled to the full benefit and income thereof. He then made some specific bequests to her and his two daughters; and declared, that the provision in his marriage settlement and by his will made for

1792.
KIDNEY
v.
COUSS-
MAKER.
WILLIAMS
v.
COUSS-
MAKER.
[*437]

1792.

KIDNEY
v.
COUS-
MAKER.

WILLIAMS
v.
COUS-
MAKER.

[440]

[442]

Upon the whole of this will the simple-contract debts are not charged upon the overplus of the money arising from the sale of the real estates. * * *

Mr. Hardinge and Mr. Abbot, for the creditors: * * *

Reply :

The leaning of the Court in favour of creditors must not be carried so far as to be extended to cases of mere conjecture. These creditors did not contract for any charge on the real estate; and therefore have only themselves to blame. The scheme of the will is this; he had real, which he chose to have sold; he had also personal; and it is admitted, that he thought the personal sufficient. He meant this only; to bring together what he calls the overplus of the real, and to add that to the overplus of the personal to form, what he calls, a residuary trust estate; intending that the overplus of the real should be that money arising from the real remaining after payment of those specific debts, and that the overplus of the personal should be that, which it would have been, if he had used none of those words, upon which the argument on the other side proceeds, namely, "after payment of debts, funeral charges, &c." to which personal property, as such, is liable. This surplus is to be added to the other; and then certain trusts are to attach upon the two together. * * *

[443]

LORD CHANCELLOR :

I will not call this a case clear of doubt. It must go upon the circumstances of the will, regulated by the intention of the testator, as it appears in the will. The leaning of the Court to make him do justice must have bounds; that is, it must be extracted from the terms of the will, and not interposed by the Court. The only question resulting is this; whether the testator by those words used with regard to the overplus of his real estates after payment of the incumbrances upon them, which he has cleared only to make them amenable to the uses of his will, intended merely that overplus to be divided between his daughters, subject only to the payments for their maintenance, *and for

[*444]

making good the annuity to his wife, or whether he has used this voluminous phrase, by which he has combined it with the surplus of his personal estate, for any other purpose. If it was a clear purpose in his mind to give as much of these real estates, as he could, to his daughters, burthened only with the annuity to the wife, the natural order of forming the will would have been the first, I have mentioned. Those words would have been the natural manner of doing it: therefore some reason must be found, why in the manner of disposing of that overplus he has so combined it. I did imagine, there had been cases more in point than the common case, where a testator combines real estate with personal generally. If that was the case, there is no doubt, that all the burthens of the personal estate would have been put upon this, so combined with it. There are many cases for that. The only question is, whether he has put the surplus arising from the real estate distinctly in the situation of the surplus and residue of the personal after discharging all manner of incumbrances, naturally falling upon it; or intended to place it in that situation, where the literal construction will place it, if attention is paid to the word "residue" in the manner, in which he has used it both as to the real and personal estate. The only material words are first as to the gift of his real estate; by which it is true, he has in the result and end provided for particular debts, but not with a view of paying debts of any sort or kind, but with a view of rendering his estate saleable and the produce forthcoming; for he has charged it with those debts subsisting upon and affecting such estates as are respectively charged and chargeable; so in the manner of making that provision he has shewn, his object was not to pay debts under a notion of discharging the obligation, but to provide, in what manner the true value of the estate to be brought forward should be ascertained. He therefore directs it to be sold, and those incumbrances actually affecting it to be paid, in order to render a balance. It was supposed, that if he had charged this with debts at all, it would not have been charged until laid out, or at least that it would not according to his intention: for I admit it may be fairly argued, what he intended, though the words were unnecessary by the operation of law upon it: but

1792.
KIDNEY
v.
COUSE-
MAKER.
WILLIAMS
v.
COUSE-
MAKER.

1792.

KIDNEY

v.

COUSS-
MAKER.

WILLIAMS

v.

COUSS-
MAKER.

[*445]

that is a difficult argument to raise on either side (for it was raised on both in some degree) ; as these words would have been applicable to all the purposes expressed, whether he used the words "laid out in the meantime" or not : viz. "in such *proportions, manner, and form in all respects, as after directed concerning the residue of my personal estate ; it being my intent, that such overplus should go with and be considered as part of the residue and surplus of my personal estate." The question, arising upon those words, is, what was in his contemplation when he spoke of the residue and surplus of his personal estate ; for I agree, that what it was in his contemplation to do with that, which he called the residue of his personal estate, that it was in his contemplation to do with the overplus, to be considered as part of the residue and surplus of that personal estate. The words used are, in effect, "for such uses and in all respects as that residue." The first question upon that would be, whether the residue of the real estate (by the residue I mean that sum remaining after the specific incumbrances paid) being thrown into the same fund, is not to be formed by virtue of this clause in the same manner as the residue of the personal estate ; if so, then it is clear, that the particular legacies, he gave in the beginning of the will as to the personal estate, will be to be deducted, in order to form a residue of both. The next question is, what is the meaning of the gift of the personal estate. He begins that with certain pecuniary legacies, and a contingent annuity, to make good the income intended for his wife ; and then disposes of all the rest, residue, and surplus of his personal estate. Those words in that context are the same as he uses before in the declaration as to the overplus of the real estate directed to go as the residue and surplus of the personal. When therefore he has made them one fund, after providing for that particular charge, he proceeds to dispose of both undoubtedly ; that is, having first said, it shall be considered as the residue of the personal estate, he gives it to his trustees and executors, thus : "all the rest, residue, and surplus of my personal estate after payment of my debts," not in terms before provided for, "funeral charges, expenses of probate, a monument, and legacies aforesaid." The question arising upon that was

properly stated thus; whether this gift means purely a description of the fund, he was to give, containing the charges only as part of the description, or a created charge, by which he intended to give the whole, in which he has directly included the surplus of the produce of the real, expressly burthened with those charges. First as to the monument; or if they were more favourable charges, which the Court would more desire to execute, if they can be said to have any desire upon the subject, inserted here: could it be contended, that *after declaring the surplus of the real estate to be in the same condition as the surplus of the personal, both should not be charged alike? That could not be so contended after the number of cases, which would have been cited, if the funds had been more blended in this will, than they are. Therefore I think here, all the charges operated and were introduced by the word “after.” It is too fine here to say, that, because the personal estate is naturally to be charged, the words, by which he has charged, are to be thrown out. It is then said, suppose the executors had renounced. Suppose they had taken only as executors, and had renounced; that would not have made any difference in the construction of the will; for the intent of the testator is not varied. It would have been just as if they had not renounced; and, taking possession, they must have held to the same uses.

The last clause inserted is, where he provides for another accident. It was foreseen, that there might be an accruer of rents and profits, before the estates directed to be sold were sold. It was unnecessary for him to have said anything as to that by his will, if that argument is to weigh much; for the law would have said, they must have gone like the rest of the surplus. He has said directly, what the law would; namely, that they should go to the fund by way of accession to it to the same persons and uses, and in the same proportions, as the interest, dividends, and produce of his residuary personal estate before given. If anything turned upon it, I should think, the word “produce” was not to be construed in its extensive sense as a produce by sale, but as a produce by annual profits. Whether if the testator had been asked, what he meant, he would or would not have said he meant to give the whole to the children clear of debts, &c. and

1792.
KIDNEY
v.
COUSE-
MAKER.
WILLIAMS
v.
COUSE-
MAKER.

[*446]

1792.
 KIDNEY
 v.
 COUSSE-
 MAKER.
 WILLIAMS
 v.
 COUSSE-
 MAKER.

have directed accordingly, is more than I know. If it was open to conjecture, there is great room to suspect, he would have given the surplus to his two daughters directly. But the ground, I go upon, is this; that the words "residue and surplus" of the personal estate, mentioned in the first clause, with which he has combined this overplus, must mean the same thing as the words "rest, residue, and surplus," of the personal estate in that clause, where it is directed to be disposed of and subjected to certain burthens, of which the debts and legacies make part. Upon the whole therefore this overplus must be deemed subject to these charges. Let that decree be made in both causes.

[*447] What was ordered to be sold is equitable *assets; but what has descended, or was devised without any charge for debts, is real. Let the costs of all parties come out of the fund.

[*Note.*—This decree was affirmed on a rehearing before Lord Loughborough, C. in 1798, and upon appeal to the House of Lords in 1797 (7 Bro. P. C. 573). On the rehearing, Lord Loughborough observed (2 Ves. Jr. 269), "The only question can be whether it extends farther after payment of debts." On this point see *Bright v. Larcher*, 3 De G. & J. at p. 156.]

BROMFIELD, EX PARTE.

(1 Vesey Jr. 453—463.)

1792
 April 28.
 THURLOW,
 L.C.
 [453]

Timber on estate of lunatic cut under order of Court, sold, and produce paid into the bank on account of the lunatic: after his death on petition by his heir for the money Lord Chancellor was of opinion, that the Court may do it for lunatic's benefit, but only on pressing occasions; that when property is converted, equity will recall it for the representative, if done by breach of trust, not if by accident, the Court, or the tort of a stranger; but on account of its consequence and difficulty of reversing order made on petition, refused to give it to either representative without a bill.

TIMBER, growing on the estate of a lunatic, was cut under an order of the Court, founded on the Master's report, that it would be for the benefit of the lunatic; and was sold, and the produce was paid into the bank on account of the lunatic: but there was

no direction as to the future application. After the death of the lunatic the heir at law petitioned for the money ; and was resisted by the next of kin.

1792.
BROMFIELD,
Ex parte.

Mr. Mansfield, for the heir :

[454]

In *Mason v. Mason*, cited in *Tullit v. Tullit*, Amb. 371, the point was expressly decided, that the right to the money arising from the sale of the timber remained in the heir, just as if it continued timber. The case has been examined ; and is rightly stated there. So in *Tullit v. Tullit* ; in which it was cut without an order by the Court.

LORD CHANCELLOR :

In that case, I am told, the accumulation of the money also, as well as the principal, was ordered to be considered as the real estate.

For the heir :

That does not appear in the report. * * * The result of the cases is, that, where it is cut, not by order of the Court, the nature of the property shall not be changed ; and that it is done by order will not vary the case. It is exactly the same, if it is prudent, whether it is done by order, or not, but afterwards approved by the Court, as prudent. There is no reason, why the heir should have it in one case and not in the other. There is but one case, in which the nature of the property was changed ; that was *Shelley's* case, in 1773 : but there was no contest ; and the same Solicitor acted for all parties. He cited *The Marquis of Anandale's* case, 2 Ves. Sen. 81.

[455]

Solicitor-General, and *Mr. Mitford*, for the next of kin :

The principle of all the cases is, that, where the property of an infant or a lunatic is concerned, the Court will not permit a wanton change of the circumstances of that property to change the rights of his representatives after his death. But for that it must be a wanton change, or what is considered as equivalent to that ; as if there is not a sufficient necessity. * * * Here there is nothing to create an equity for the heir to have this personal property again converted into real. This being a case, in which the timber has been cut by the Court for the benefit of

[459]

1792.

BROMFIELD,
Ex parte.

the lunatic, and the produce having been carried to the account of the lunatic's estate, it is to be considered as personal estate ; and whatever is the case, where it has been cut wrongfully, yet, where the Court has said, it is for the benefit of the lunatic, and there is no attempt to shew surprise, the Court has never assisted the heir against the personal representative. The report, upon which the order to cut was made, clearly shews, that it was for the lunatic's benefit : as this timber was decaying daily, and occasioned daily injury to the rest of the estate. Therefore if he had lived, he would certainly have been injured, if it had not been cut. If it was necessary to increase the allowance of a lunatic, the Court would cut down timber, not decaying, if it would render his state more comfortable. They cited *Lord Winchelsea v. Norcliffe*, 1 Vern. 485 ; *Ex parte Ludlow*, 2 Atk. 407 ; *Ex parte Grimstone*, Amb. 706.

[460]

Reply. * * *

[461]

LORD CHANCELLOR

If there is any principle, to which these cases can be brought in order to make them consistent, I have not observed it upon the statement of the cases now ; as I think, some of them in their decisions, many in their sayings, have a repugnance, that will require farther examination : therefore I will look into them, and particularly the collection of orders in this Court, which have been stated. If I am at liberty to follow the principles and reasons of natural justice, they are very strongly expressed by Lord NORTHINGTON in that case in *Ambler*. It is said, that by the statute of provision for lunatics the Court cannot meddle with the estate in cutting timber. If that is true, it proves, that the Court cannot upon any account whatsoever apply the timber, growing upon a lunatic's estate, even to the most urgent personal occasions of the lunatic ; that, though he was pressed with debts, which rendered his maintenance impossible, or which would bring his person into a gaol, (for he must be sued for his debts,) the Court could have no right to cut the timber, as the King has promised to keep his lands without spoil or waste. I doubt, whether it is possible to assimilate the case of a lunatic tenant in fee to that of tenant for life impeachable for waste ; as the

latter has no property in the timber at all ; and therefore waste by him has a different consideration from that waste, mentioned in this statute ; which only means without destruction ; and does not hinder the committee under the authority of the King from making use of those opportunities, which the property of the lunatic would enable him, if in possession of his senses, to make use of, to deliver himself personally from any pressing urgency. When that is gone, I cannot distinguish between lunatics and infants ; and if not, there are, I conceive, many cases, which prove this power more distinctly than the case of lunatics do ; though that of Grimstone goes a good way. It is said, the Court has more power over the personal than the *real property of lunatics : that goes back ; and insists, that the authority of the Court does not go to touch any part of the inheritance, or to diminish it ; as it is to be kept without waste or alienation. It is clear, that in estimation of law at the death of a lunatic under these circumstances this money is part of his personal property. Suppose, simple contract creditors of the lunatic were to be paid : it would be difficult under such a pretence of equity as the heir now makes to contend for the application in his favour, not only against personal representatives in general, but against the creditors. When once I consider this as part of his personal estate, I cannot reason it out of that case but upon the supposition of an equity for the heir to recal the legal situation of the assets of the lunatic, and to apply them to his use ; and I conceive that to be difficult ; and that the case does not warrant me in doing it upon other grounds than this ; that, where a committee or guardian is entrusted with the care of an estate, and has abused that trust with a view of changing the quality of the estate to serve his own interest, there arises an equity to undo the act, tortious in that way. But I know no rule of equity upon a less ground than that. Perhaps the Court, where guardians or committees have without order taken upon themselves to change the property, will, particularly where there is a cause in Court, consider it as a matter of fraudulent management ; for that is the ground upon which the Court must proceed. I think, I remember an application once, where timber had been cut down by a stranger

1792.

BROMFIELD,
Ex parte.

[*462]

1792.

BROMFIELD,
Ex parte.

tortiously ; and it was insisted, that by equity it ought to be restored to the estate ; and it was refused ; as there was no abuse of confidence, but it was the tort of a stranger ; and, being so, it was held, that there was no equity upon the subject ; and, I think, the law now is, that, if timber was cut down so, it would be like the case of windfalls, and ought not to be restored by equity. Considering it so, it is impossible, where the Court, taking those precautions, it always does, and ought, to take, not to do it idly or unnecessarily, but for the benefit of the lunatic or infant, thinks proper to cut timber, and convert it, to conceive an equity to change the condition of that, when become personal property, and to replace it for the heir ; as it is truly said, that being done for the benefit of the infant, it becomes indifferent, whether it is to be for the heir or personal representative afterwards ; and it cannot be recalled in either case ; and, as the cases are quoted, particularly that before Lord *Bathurst, they have gone upon that idea, that, where it is found to contribute to the interest of the party to make the change, that has been thought so good a reason for it as to exclude all considerations of hardship, or an equity between representatives. When I have said all this, I must observe, that the Court ought to be very reserved in changing one species of property into another, and to do it only upon pressing occasions ; and when it is done, the only ground, upon which I can give it out to the one party or the other, must be an equity so distinct as to govern it upon the proper rules of law ; as this is not the *forum*, that ought to decide in nice cases, on account of the difficulty of getting the decision reversed ; but, if it is of great consequence, it ought to be put into the shape of a bill. If that is to be done, I hope the bill will be drawn like a case, and the answer in the same way ; and that I may not by saying this institute an expensive suit. It is only necessary to state the sum raised by cutting the timber, and the order, and the equity arising for the heir to have that sum paid to him ; as, although it is proper to change the property, yet it is not proper to do so against the representatives. In the mean time I will look over those cases, and see, whether I can make anything more of them.†

[*463]

† A bill was afterwards filed by the heir-at-law and dismissed. See next case.

For convenience of reference the following case is here inserted from 2 Vesey Jr. in continuation of the last preceding case.

OXENDEN *v.* LORD COMPTON.*

(2 Vesey Jr. 69—78.)

There is no equity between the real and the personal representatives after the death of a lunatic to have property, which was altered by the Court, restored; therefore the produce of timber on the estate of a lunatic cut and sold by order on report, that it would be for his benefit, is personal assets.

Real and personal representatives, being equally volunteers, must take what they find at the death of the person entitled for life in the condition, in which they find it: there is no equity upon the subject.

Where timber makes part of the general rental of an estate, in case of lunacy it would be a breach of duty not to manage it in the usual manner.

In managing the estate of a lunatic the general principle is to attend solely to the interest of the owner without any regard to the succession.

In administering the estate of a lunatic the Chancellor may apply personal estate in payment of debts to any extent; and is to take every advantage, that tends fairly towards ordinary improvement, considering only the immediate interest of the proprietor; but consistently with that alteration of property is as far as possible to be avoided; and great care must be taken, that nothing extraordinary is attempted, as purchasing estates, disposing of interests, engaging in adventures, &c.

If a bailiff cuts timber without authority, and before it is sold the party dies, it is personal assets; and the heir has no action against the personal representative; nor is there any equity between them on the subject.

[For the arguments and cases cited, see the preceding case.]

THIS bill was filed by Sir Henry Oxenden, heir-at-law of a lunatic, against the next of kin, in consequence of the opinion expressed by Lord Thurlow on the petition of the heir for a sum of money, produced by the sale of timber cut upon the estate of the lunatic under an order of Court founded upon the Master's report, that it would be for the benefit of the lunatic; as some of the timber was in a state of decay, and injuring the rest.† The prayer of the bill was, that the personal representative

1793
March 5.
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LOUGH-
BOROUGH,
L.C.
[69]

* *A.-G. v. Marquis of Ailesbury* Q. B. 83.
(1887), 12 Ap. Ca. 672, 688, 57 L. J. † *Note.*—See last case.

1793.
 OXENDEN
 v.
 LORD
 COMPTON.

should account for the assets ; and that after payment of debts if there should be a sufficient surplus, the plaintiff should be paid out of that to the extent of the sum produced by the timber cut.

[70] LORD CHANCELLOR :

The object of this bill by Sir Henry Oxenden, as heir-at-law of the lunatic, is to convert personal assets into real ; and the prayer of the bill itself betrays a considerable degree of doubt with regard to the practicability of that operation by the power of the Court ; for it is not founded upon a specific right to the individual sum of money, stated to be the produce of this timber : but the prayer is, that the personal representative shall account for the assets ; and that after payment of debts, if there is enough remaining, what remains, taking this sum into the account, shall to the extent of this sum be paid to the plaintiff. Therefore the bill admits, that at present it is personal assets ; and, as such, must be applicable to debts ; and it goes only upon the supposition, that there is a clear fund of personal estate to the extent of this sum, which is the produce of the timber. In the course of this cause I have been much embarrassed to conceive what equity there is between the real and personal representatives. Both are volunteers. Each must take what they find at the death of the person entitled for life in the condition, in which they find it. The legal right is not questioned : then upon what equity must I make this transmutation for the benefit of a person equally a volunteer ? If it is possible for me to retain this bill (and no case has been cited suggesting any analogous equity) I cannot give the plaintiff the object of his bill, the specific sum produced by this timber ; for then I should give him a profit, which upon the circumstances appearing on the report, which is not controverted, in all moral probability he never could have had, if the estate had continued untouched in consequence of any order of the Court : but in all moral probability he is, as possessor of the real estate, in possession of a benefit in consequence of this act of cutting the timber by the improvement made thereby in what was left ; for it appears by the report, that it was in a state, in which it would annually

deteriorate; and it is also stated, that by the standing of that timber, the timber growing in the same place was every year lessening in value; so that this estate but for this act would have been in a much worse condition; and the value of the timber would have been annihilated. It was argued, as if this proceeding was in the course of the orders of lunacy. That leads to the principle, upon which the administration of the estates of lunatics stands; and how it is committed, not to the Court *of Chancery, but to a certain great officer of the Crown. The statute† is not introductive of any new right of the Crown.‡ The better opinion inclines that way; and the words of the statute put it past all doubt. The object was to regulate and define the prerogative, and to restrain the abuse of treating the estates of lunatics as the estates of idiots. The words are “The King *habet providere*,” that their lands and tenements shall be safely kept without waste and destruction; and that they and their household shall live and be maintained competently with the profits; and the residue besides their sustentation shall be kept to their use, and be delivered to them, when they come to right mind; so that such lands and tenements shall in no wise be aliened. In the phrase, that the King is to keep the lands without waste and destruction, I understand those words in the ordinary sense, not in the technical sense of waste. It is admitted, there are cases (which would not at all apply to the case of tenant for life or years), in which to cut timber upon the estate of a lunatic would be no waste. In cases, where the timber upon the estate makes part of the rental, not merely where it is necessary for his sustenance, but if it is part of the general rental, there is no doubt, that it is the duty of the administrator to continue the usual management of the estate, and that, which is suited to its circumstances. Some estates in Sussex in these circumstances were mentioned at the bar; and I know one estate, belonging to a very noble family, possessed of most valuable woods of full grown timber, fit for the navy; and the prudence of that family restrains them from cutting annually more than to a certain amount, I do not know how much, but about the value of 1,500*l.* or 2,000*l.* per annum. In case of an

1793.
OXENDEN
v.
LORD
COMPTON.

[*71]

† De Prerog. Regia. 17 Ed. II. c. 10.

‡ Amb. 707. 2 Inst. 14.

1793.
 OXENDEN
 v.
 LORD
 COMPTON.

accident of this nature happening to the owner of that estate it would be a breach of duty in those, who would have the administration of it, not to manage it in the same manner, in which it had been managed before, and as he would manage it himself, if capable. If that estate was unfortunately settled upon a strict tenant for life, that could not be done in any ordinary course of disposition.

[*72]

The course upon the statute has been, that the Crown has committed to a certain great officer of the Crown, not of necessity the person, who has the custody of the great seal, though *it generally attends him, by warrant from the Crown, which confers no jurisdiction, but only a power of administration. If that power is abused, if any thing wrong is done, or error committed, the appeal is immediately to the King, and not in the ordinary course attending the established jurisdictions of the kingdom.† The orders, that are made by persons charged with the custody of lunatics, are appealable to the King in Council. In the series of them there is one general principle, though I do not say, it is without some possible deviation, that the general object of the attention of the administrator is solely and entirely the interest of the lunatic himself, and with regard to the management of the estate solely and entirely the interest of the owner, without looking to the interests of those, who upon his death may have eventual rights of succession; and nothing could be more dangerous or mischievous than for him to consider, how it would affect the successors. There will always be among them an emulation of each other; and their speculations, if the administrator was to engage in them, would mislead his attention, and confine his observation as to the interest of the only person he is bound to take care of. The next of kin would contend for a short allowance. The heir would have no interest to contend for a small allowance out of the rents and profits; but might have an emulation against the next of kin; and therefore, where the next of kin would contend for a narrow allowance, the heir would insist on a large one. Therefore the Court have always shut out of their view all consideration of eventual interests; and consider only the

† 3 P. Will. 108.

immediate interest of the person under their care. If the interests of the succession were to be respected by the Court, I should expect not only precedents, but a continued course of accounting, that would manifest it to be the object of the attention of the Chancellor. There would be a continued running account between the personal and real estates. There are many cases, in which it is necessary to apply personal estate to purposes relating to real estate; as in repairs, &c. If it was necessary for the interest of the real estate to bring an action of trespass, which might run into a great expense, if that was not to be paid out of the personal estate, a great injury might be sustained: but that must have been allowed perpetually in the receiver's accounts; and I believe, there is no instance of a charge in receivers' accounts of what has been expended upon one estate in order to charge it for the other. In the case of Mr. Newport, *in which I believe no order was made without opposition, considerable repairs were made upon the estate; new barns were built, &c.; and the reference was to consider, whether it was for the benefit of the lunatic and his estate; and no distinct account was kept, or credit given to the personal estate for that improvement. In the case in 1 Vern. 262, the Court determined, that the heir of a lunatic is to take the real estate with the improvements without any allowance for the personal representative; and no idea of an equity between the representatives was suggested. Suppose, there was a colliery upon the estate; what consequences would follow from attending to the interests of the succession? Suppose a vein of coal actually working, but almost worn out; but that by sinking lower and erecting a fire-engine a considerable quantity of coal might be got at. That would be a speculation of profit and loss. If the fire-engine was large, which would occasion a considerable expense, some of them having cost 5,000*l.* or 6,000*l.*, the heir might think it most for his interest to have a sum of money laid out to free the colliery; and the personal representative would oppose that. But suppose the expense would be very inconsiderable; then it would be the interest of the heir to oppose the erection of the fire-engine; as there would be the coals for him some time or other untouched: but it would be the interest of

1793.
OXENDEN
v.
LORD
COMPTON.

[*73]

1793.

OXENDEN

r.

LORD

COMPTON.

[*74]

the personal representatives to press it on; as by laying out a small sum there would be a considerable increase of annual profits. If the Chancellor was continually looking to the right and left, and weighing the probable interests of the representatives, the interest of the lunatic would be committed in favour of those, who have no immediate interest, and whose contingent interests are left to the ordinary course of events. Therefore the Chancellor is to administer the estate *tanquam bonus paterfamilias*, making every advantage fairly to increase and improve it without engaging in risks and dangerous adventures; for those are not fit enterprizes. But whatever tends towards ordinary improvement it is strictly the duty of the administrator to do, considering only the immediate interest of the proprietor of the estate. But when I am laying down this so generally, I must be understood to do it with this guard, that great care must be taken, that nothing extraordinary is to be attempted; as estates to be bought, or interests to be disposed of. Alteration of property is as far as possible to be avoided consistently with the idea of preserving the interest of the proprietor. Payment *of debts, it is admitted, is so much for the interest of the owner of the estate, and such pressing cases might be put, that the CHANCELLOR would order the application of personal estate to any extent to pay debts. In *Ex parte Grimstone* it was the debt of the ancestor, that could not affect the person: but it was done upon the ground, that it was what the proprietor in managing his own property ought in prudence and good sense to have done. In the order the CHANCELLOR directed it, not *ex necessitate*, but feeling it to be prudent to disencumber the real estate, when the personal could afford it; and it was done in the ordinary course by assignment of the mortgage terms in trust to attend the inheritance. The order, made in the present case, is perfectly right. From the report it was evidently for the advantage of the estate and the lunatic to fell this timber. There was at least a great probability, that it would be no disadvantage to any one. The real estate is, not deteriorated, but meliorated; and the fund of the personal estate is increased by something arising out of the real estate, the fair fruit of the real, come to maturity, which, if not then gathered, would be lost. The order, which is perfectly right, is

now in full force. I have no right to vary or add to it ; as there is no appeal. The effect of it is, that it has created by the execution of it a fund of personal assets ; in which condition I find it. It was said upon the reasoning in *Beverley's* case, 4 Co. that the power of a committee is like the power of a bailiff. Suppose it cannot be raised higher : if a bailiff had cut timber without any authority, which would be very wrong conduct in a bailiff, but suppose he had done it, and, before it was converted into money, the party died ; there could be no doubt, it would be personal assets. Whether the heir could have an action against the bailiff, I will not say : but certainly he could not against the personal representative ; and though the bailiff might be answerable for his misconduct, there is no equity between the representatives upon the subject. *Ex parte Grimstone* is the only authority, in which the order of the CHANCELLOR was interposed to have in taking the account a part of that, which was in fact personal estate, made applicable to the real representative. I have happened to keep my brief in that cause ; and very little authority appears to be due to the order of 2nd November, 1771 ; in which Lord APSLEY had directed, that with regard to the timber cut down without order what was not applied in repairs should be accounted for to the real representative. That *order is quite inconsistent with the order made by Lord APSLEY half a year afterwards in the very same lunacy. I rather think, the surplus after the repairs was so trifling, that the parties did not think it worth while to rehear it. The most material point turned upon the mortgage paid off out of the personal estate under an order, made by Lord NORTHINGTON in 1764 to pay off a mortgage term of 1,000 years, and that the term should be assigned to attend the inheritance. In 1766 another order was made to pay off another mortgage for a less sum. On the 4th of September, 1770, the lunatic died. On the 19th of March, 1771, the bond entered into by the committee was cancelled. In July, 1771 (which date is material), a petition was presented to Lord Apsley upon the ground, that the orders, made for the terms to attend the inheritance, were founded upon mistake. On hearing that petition Lord APSLEY made an order according to it ; and reversed the orders, made by Lord

1793.
OXENDEN
v.
LORD
COMPTON.

[*75]

1793.
 OXENDEN
 v.
 LORD
 COMPTON.

[*76]

NORTHINGTON in 1764 and 1766. After that a petition to rehear Lord APSLEY's order was presented on the 4th of December, 1771. In the interval this order of November, 1771, was made. Lord APSLEY reheard his own order of July at his house; and was assisted by Chief Justice DE GREY and Baron SMYTHE. The Judges differed. The Chief Justice thought Lord NORTHINGTON right and the last order wrong; and Lord APSLEY agreed in that opinion. I have a note of Chief Justice DE GREY's judgment; which was delivered in that clear manner, in which that great man and very able lawyer always expressed himself; and which did strike me as extremely well worth preserving. I have also a note of Lord APSLEY's judgment; *which is short, and only a recapitulation of what was said by the Chief Justice. Then mark the authority of this case. It happened, that the decision was favourable to the heir; but upon this ground, that the property was to be taken in the condition, in which it was found. The same principle would equally apply to the next of kin; that, supposing the owner acting himself as a prudent man, the representatives are on a par with each other; and must take the property, as they find it at the death of the person, from whom they claim. From that time I have considered it as settled, that the benefit of the lunatic only is to be considered, not that of the representatives: but that what is done with that view must be done with great temper; and not, if uncalled for (that must be the qualification); and that neither party can have any foundation of equity to call upon the other to account for what the other has received. The *dictum* of Lord HARDWICKE in *Anandale's* case cannot well apply. I doubt the accuracy of Mr. Vesey's note; particularly because no notice is taken of the style of speaking in the note in Ambler. There was nothing calling for that determination; and in what Lord HARDWICKE decided he materially varied the succession. There were two questions. Lord Anandale was entitled to a large estate on the part of Mr. Vanden Bembe, his mother's father, and to a sum of money, to be laid out in the purchase of lands in England. The creditors were proceeding in a very expensive mode of adjudication against his estate in Scotland. The trustees having no authority to do it, a private act of Parliament was obtained to

enable the trustees under Vanden Bembde's will to apply 35,000*l.* upon the security of Lord Anandale's estate in Scotland. After he became a lunatic, and there was no hope of his recovery, his mother and her other children being entitled in remained, it became material to alter that application of the estate; and an application was *made to Lord Hardwicke to recal the money from Scotland, and to replace it in the funds of this Court, as a trust estate. This was violently opposed; and the contest was between those, who would be his representatives with regard to what would be his personal estate in Scotland, and those, who would be his representatives with regard to what would be his personal estate in England. Lord HARDWICKE referred it for inquiry, not whether it would be for the benefit of the lunatic, but of the trust estate, to call it in. The interest of the lunatic was then almost a nullity; as either way it paid for his maintenance: but the interest, which moved, was the difference it would be attended with to the succession. In consequence of the decision they sued for it in Scotland; and it was finally determined in the House of Lords, who reversed the decree of the Court of Session, that it was to be repaid from Scotland to the trustees of Vanden Bembde's estate. One question was as to the produce of a heritable jurisdiction, as to which Lord Anandale was under no entail. The money would have been his own entirely. It was to issue from the Exchequer here. Then with regard to this sum there was a conversion of interest; for Lady Anandale desired it should be kept here; and Lord HARDWICKE rightly determined it upon the particular provision in the act, that in cases of infants, lunatics, &c. the Court of Session should take order for disposing of that money, which was the produce of the sale of the jurisdiction, according to justice in a summary way. Therefore he said, he would make such direction, as the Court of Session would do; as an authority was given to them under the act of Parliament; and it was not to be considered as at all changed, the legislature having invested that Court with power to dispose of it. Upon the two points determined there was not much room for that reasoning, stated in Vesey; and in the result of the case it is clear, that Lord HARDWICKE's determination took a line to do that, which ought

1793
OXENDEN
v.
LORD
COMPTON.

[*77]

1793.
OXENDEN
v.
LORD
COMPTON.

to be done with regard to his situation as a lunatic, without any regard to the contingent interests of those, who imagined they would some time or other be his representatives. I remember the case of *Flanagan v. Flanagan*, before Lord Camden. It shews, the Court thought there was no equity between the representatives. What was done under the order turned out to be clearly wrong. So much of the estate was to be sold, as would pay debts. They sold the bulk for convenience *of sale; and there was a surplus; which, if the order had been strictly pursued, would never have been money, but real estate. It happened, that by the order not being followed distinctly, or guarded sufficiently in the execution, that, which would have been land, was in fact money. Lord CAMDEN thought, nothing arose upon that: but that the parties ought to take their respective rights, as they find them.

[*78]

Upon the whole the bill must be dismissed: but it is not a case for costs.

1792.
May 4, 7, 8.

THURLOW,
L.C.
[464]

MOGGRIDGE v. THACKWELL.†

(1 Vesey Jr. 464—475.)

Legacies nearly similar given to the same persons by different instruments: legatees not entitled to both.

Legacies to the same persons by different instruments generally presumed additional, unless contrary intent appears; of which simple repetition if exact is sufficient proof.

Legacies by one instrument not adeemed by a second, not relating to the first.

ANN CAM made her will June 16th, 1779, giving several annuities, charged on her real estates, and among them 15*l.* per annum to Elen Pheasant, her late servant; and, among several legacies to charities and individuals, to her servant George Eliott 200*l.* unless otherwise provided for by her in her lifetime. She afterwards made four codicils, of which the two first contained legacies to the same persons very nearly similar, and in nearly the same terms. The first question was, whether those legacies in the

† *Wilson v. O'Leary* (1872), L. R. 7 Ch. 448, 41 L. J. Ch. 342.

second codicil were to be considered as additional or as mere repetition. The first codicil was in the handwriting of the testatrix ; and in the following words :

1792.
MOGGRIDGE
v.
THACKWELL.

“ A codicil to my last will and testament, which I desire may be taken as a part and parcel thereof: I give to Peter Triquet, Esq., of Craven Street, 100*l.*; to William Pollock, Esq., of Downing Street, Westminster, 100*l.*; to Elizabeth Thackwell, eldest daughter of John Thackwell, of the parish of Berrow, in the county of Worcester, 600*l.* 3 per cent. consolidated bank annuities, with the dividends to be accumulated from my death to the time she shall attain the age of 21 years; to Robert Woodford, Esq., I give 500*l.*; to Judith, the second daughter, I give the sum of 600*l.* stock, with the interest that shall be accumulated when she attains the age of 21 years; and to the four youngest daughters of the said John Thackwell, Margaret, Mary, Sarah, and Nancy, I give 400*l.* each in stock with the interest *that shall accumulate till they arrive at the age of 21 years; and if any die before they attain the age of 21 years, that child or children's portion shall be divided amongst the rest of the other children; to George Eliott I give 100*l.* over and above what I have left him in my will. In witness whereof I have hereto set my hand and seal this 12th day of April, 1780. ANN CAM.”

[*465]

The legacy to Elizabeth Thackwell, as it stood generally in the first codicil, was 600*l.* stock generally; but had been altered by striking out the word “stock,” and interlining in the handwriting of Robert Woodford the words “3 per cent. consolidated bank annuities.”

The second codicil was in the handwriting of Robert Woodford, and in the following terms:—“A codicil to my will, which I desire may be taken as part and parcel thereof. And I give to Peter Triquet, of Craven Street, Esq., 100*l.*; and the same to William Pollock, of Downing Street, Esq.; I give to Elizabeth Thackwell, eldest daughter of John Thackwell, of Berrow, in the county of Worcester, Gent., 600*l.* 3 per cent. bank annuities consols; and I order my executors to accumulate the dividends thereof for her benefit, and the principal and such accumulations

1792.
MOGGRIDGE
v.
THACKWELL.

to be paid to her on her arrival at the age of 21 years ; the same to Judith, another daughter, on the same terms ; and I give 2,000*l.* 3 per cent. bank annuities consols to the other daughters of the said John Thackwell, equally to be divided between them as shall be living at the time of my decease, but on the same terms as their other sisters' legacies and accumulations are ordered : but my will is, that if any one of the daughters of the said John Thackwell shall die before their respective attainment of 21 years, I order each daughter's legacy with the accumulations to be equally divided amongst her surviving sisters ; I give to Elen Pheasant, 5*l.* per year, during her life more than I have given her by my will ; and I give to my George Eliott 100*l.* more than I have given him by will, provided he shall be in my service at the time of my decease. In witness whereof I have hereunto set my hand this 10th day of May, 1780. ANN CAM."

Third codicil :—" I desire after my death that if my servant George Eliott likes to continue at Dymocke, he may be retained with a salary of 50*l.* a year to do all the business that is to be done in the country ; which I think will be of great use to the executors."

By the fourth codicil she desired that George Eliott may have 20*l.* in lieu of what may be owing to him on the face of the books ; and that his account may be taken ; as she had not the least doubt of his integrity. These two codicils were in the testatrix's handwriting. Woodford died in the life of the testatrix.

A second question was raised upon the following bequest in the will to James Vaston ; who was not one of her trustees for the general purposes of her will : " I give all the rest and residue of my personal estate to James Vaston, his executors and administrators, desiring him to *dispose of the same in such charities as he shall think fit, recommending poor clergymen with large families and good characters."

Vaston died about nine years before the testatrix ; who had full knowledge of his death : but never made any alteration in that residuary disposition. The question upon this was, whether that charitable bequest could be executed by the Court. [This

second question was afterwards reheard by Eldon, L. C., in 1802 (7 Ves. 36), and the report of that rehearing will be included in a later vol. of the "Revised Reports."] * * *

1792.
MOGGRIDGE
v.
THACKWELL.

Solicitor-General, Mr. Mansfield, Mr. Mitford, Mr. Burton, and Mr. George Wilson, for the next of kin :

The first question is plain; for the rules laid down upon double legacies are rules applied to cases, in which there is no evidence of intention upon the papers to be construed. In *Hooley v. Hatton*, 1 Bro. C. C. 390, in the report of *Ridges v. Morrison*, Mr. Justice Aston states the general rule, that where the same persons have legacies under different instruments, they *are double legacies: but upon the whole they are not so here, except those to Eliott and Pheasant. * * * *Coote v. Boyd*, 2 Bro. C. C. 521, is not distinguishable from this case. There your Lordship thought, that notwithstanding parol evidence of an intention to make a farther provision, and that there was more property, the second codicil must be a substitution for the first. Generally speaking, dispositions to the same persons by different instruments are in accumulation without a particular reason to the contrary; if by the same instrument, it is generally considered as a mistake, and they are not double. Where it is by different instruments, it must be founded upon this, that there is no reason for making the second but to give additional legacies.
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[*467]

[468]

Mr. Selwyn, Mr. Sutton, and Mr. Burton, for those, who claimed double legacies :

[472]

There is more than sufficient to pay these double legacies. The first codicil is in as good a form as the second. A man of business would have advised her either to revoke expressly the first codicil, or to cancel it, if such was her intention. The general rule is, that legacies given by two instruments, whether the same, greater, or less, are both to stand, unless an intention to the contrary appears. These rest entirely upon the two instruments, being simple legacies without any motive or cause assigned. In *Wallop v. Hewett*, 2 Chan. Rep. 37, double legacies were held to be distinct. *Foy v. Foy* before Lord Kenyon at the

1792.
MOGGRIDGE
v.
THACKWELL.

Rolls, 1st Feb., 1785. The only cases to the contrary are *The Duke of St. Albans v. Beauclerk* upon the internal evidence of the instruments, and the case before your Lordship of *Cooté v. Cooté*, or *Cooté v. Boyd*, as it was called in 1789. But that was upon very particular circumstances. All the legacies in the first instrument were exactly the same as those in the second, except one of 5,000*l.* to Miss Monckton; upon which your Lordship thought, the latter was made on purpose to give her that legacy: besides the residue was given in exactly the same terms in both, which had much weight.

LORD CHANCELLOR:

The first question is, whether these legacies are to be considered as additional, or as only repetition. That question arises merely between the two codicils. With regard to the will the codicils are certainly additional; but the question is, whether they are so with respect to each other, or mere repetition. It is true, the general presumption is, that where a person leaves two different instruments, as a will and codicil, or two codicils, legacies given by both to the same persons are, generally speaking, to be considered as additional; and that presumption is upon the other side checked by this, unless there appears to be some intention to the contrary. I am sorry to say, it is left by former determinations upon very indistinct grounds; and it is a great inconvenience, when a question of this kind falls to be decided upon grounds not distinct. But it is impossible now to lay down a rule of discretion without departing from the cases; *which have established first, that the second instrument is additional to the first, because *primâ facie* there is no reason, why the second instrument should be made, unless the intention was to add to the first: but this of course must be checked by this, that if there is evidence, that instead of addition it was intended simply as repetition, it is not additional; and simple repetition, where it is exact and punctual, has been regarded as sufficient proof, that it is only intended for repetition; but especially if beyond that general article of presumption the second affords also other presumption of an intention to make it to explain the first; that purpose, if it can be manifested and properly produced by the

[*473]

form of the second, goes *a multo magis* to prove, that the second bequest, given only with such different terms as serve to assist that purpose, will be considered as a stronger proof, that they are the same legacies better and more correctly explained. I may state at the outset, that certainly it was not intended, that the second codicil should be a substitute for the first; that is clear, because by the first there is a legacy to Woodford, and none by the second; and there is no expression in the second purporting to adeem the legacies given by the first; and by law those cannot be adeemed by an instrument not relating to the first; and so foreign to it as the second codicil is in this case. If the second instrument makes any or all a repetition, it must be, because the second legacies purport to explain the first; and they are so exactly in the same words as to raise a probability from that circumstance; and standing in the context they are apparently an intention to recal the subject and repeat the instrument. She gave Judith 600*l.* stock, not stating what stock nor what fund, but leaves it uncertain; and that from carelessness and ignorance, thus making it uncertain what she intended to give; for that is so loose, that unless she could refer to other parts to make that certain and significant, which is uncertain, it is very difficult to understand that part. So in the bequest of 400*l.* stock to each of the four younger daughters of Thackwell she does not say what stock. As to them the last bequest is in expression somewhat more exact; but it is just the same thing. The bequest to Judith in the second codicil is in this way; "the same to Judith another daughter upon the same terms:" that is to correct the general phrase "stock" used in the former codicil; for by using the word "same" the stock is ascertained, which it was not before. So in the legacies to the other daughters there is a correction *to specify the particular stock. It is justly contended upon the bequests to Elliott and Pheasant, that by the circumstance of referring in each of these to the will it is plain, she meant each to apply in accumulation to the will. If in other respects these codicils were so framed, that the presumption would have arisen from no other quarter, and if the legacies given by them had been upon different terms, and there was no other circumstance to control the inference from thence, those

1792.

MOGGRIDGE
v.
THACKWELL

[*474]

1792.
 MOGGRIDGE
 v.
 THACKWELL.

words "more than I have given by my will" in the second codicil might have applied to both the will and codicil. But the same interest being given in so nearly the same terms, those words fairly assist the inference, that in writing the second codicil she thought, she was doing the same thing as when writing the first, and making a gift additional to the will only: and to the apparent reason for repeating the legacies to the same persons may be added, if necessary, that the same person, who wrote the second codicil, began to write the interlineation upon the first, and found, that it would too much obliterate the first, and probably did not wish, that the legacy to himself should appear in his own handwriting, but rather that it should remain in her's without any appearance of meddling on his part. But whatever the reason may be (to keep clear of too remote conjecture) it is plain, that within the reason of all former determinations there is too much evidence, that instead of intending this as additional, because there is no reason, why she should make it unless for the sake of addition, there is a very distinct reason to the contrary; and that becomes much enforced by the reference to the will only as the instrument, under which Eliott and Pheasant had legacies. Therefore each is ancillary to the will only; and these legacies are not additional. * * *

[His Lordship then held that the charitable bequest must be sustained, and referred it to the Master to settle a plan.]

1792.
 May 14.
 THURLOW,
 L.C.
 [477]

LEGARD v. HODGES.

(1 Vesey Jr. 477—478.)

Covenant to set apart and pay annual profits of land is in equity a lien on the land against the covenantor and claimants under him with notice.

Agreement concerning any subject, though in form personal, raises a trust in equity against the party himself, volunteers, and claimants with notice under him; except where the effect would be to restore the power of violating it, as where tenant in tail has suffered a recovery contrary to his covenant.

MR. HODGES, tenant for life of estates in England and in the West Indies, by his marriage settlement, in consideration of

4,000*l.*, the fortune of his wife, agreed that the said sum should, with 10,000*l.* to be paid by him, be laid out in trust to be applied to certain uses; and, in order to raise the said 10,000*l.* he covenanted with the trustees in the settlement, that he would set apart and pay to those trustees one-third part of the clear annual profits of his estates in England and in the West Indies. Afterwards, being pressed with debts, he conveyed his life estate, so bound by his covenant, to other trustees to raise 1,000*l.* a year for himself, and, subject thereto, to pay off certain debts and incumbrances, the object of the last settlement, which took notice of the first. The bill was brought by the trustees under the first settlement to have a trust declared for the purposes of that settlement as to one-third of the clear annual profits of the life estate of Mr. Hodges. For the parties, claiming under the last settlement, it was contended, that under the first there was no lien upon the land but a mere personal covenant.

1792.
LEGARD
v.
HODGES.

LORD CHANCELLOR :

Having taken a short time to consider this day delivered his opinion.

The reference in the last settlement to the first puts it out of all question, that all the parties to the last had notice of the first; so that it is reduced merely to a question upon the operation of the first. On one side it was insisted to be a personal covenant, and that there was a remedy at law; and for that was cited *Collins v. Plummer*, 1 P. Will. 104, where tenant in tail, remainder over, contracted in a settlement not to suffer a recovery. The effect of that would be the descending of the estate to the issue. An attempt was made to consider that as a covenant binding in equity upon the subject-matter of the agreement. On the other side it was insisted to be a personal covenant; and it was held to be so. I confess, I think, it was impossible to apply to that case this doctrine of a Court of Equity, that, whatsoever is the agreement concerning any subject real or personal, though in form and construction purely personal and suable only at law, yet in this Court it binds the conscience. I cannot apply that to that case, because the utmost effect of it

[478]

1792.
LEGARD
v.
HODGES.

would be to restore the estate tail; and to do that by the conscientious agreement not to destroy it would leave it under the same power as before. Excluding that case, none of the rest go to establish a proposition in contradiction to this maxim, which I take to be universal, that wherever persons agree concerning any particular subject, that in a Court of Equity as against the party himself, and any claiming under him voluntarily or with notice, raises a trust. These persons have so claimed; and therefore this is a pure trust estate, and they must be declared trustees for one-third of the clear annual profits, and must account from the time of taking possession, having all just allowances.*

The other cases cited at the bar were *Lord Warrington v. Langham*, Pre. Ch. 89; *Bosvil v. Brander*, 1 P. Will. 458; and *Flight v. Cook*, 2 Ves. Sen. 619.

1792.
May 18.
Mr. Justice
BULLER for
the LORD
CHANCELLOR.
[479]

PIGOT v. BULLOCK.

(1 Vesey Jr. 478—484.)

Tenant for life has no property in the underwood, till his estate comes into possession: therefore cannot have an account of what was cut wrongfully by a preceding tenant.

Tenant for life without impeachment of waste cannot maintain trover for timber severed during a prior estate; but it rests immediately in the owner of the inheritance. Tenant for life impeachable is in the same case as to underwood. Costs given.

MR. PIGOT, tenant in fee, in 1748 devised to his wife, in case he should leave no issue, all his estate, to hold the same during her life "with full liberty to cut timber and underwood for repairs or for her own use in fuel or otherwise, but not to sell;" remainder to the plaintiff for life, remainder to his children in tail. The testator died in 1751. In 1753 his widow married Lord Saye and Sele, who died in 1781. Lady Saye and Sele

* This decree was affirmed as to before Lord Loughborough, C., 4 the principal point on a rehearing Bro. Ch. Ca. 421.

died in 1789, after having cut down and sold timber and underwood upon the estate devised to her. The testator having left no issue, the next tenant for life brought the bill against the executors of Lady Saye and Sele for an account of the money received by her for the underwood cut from the testator's death to the time of her second coverture, and from the expiration of that to the time of her death; but he made no claim in respect of any cut during her second coverture, as the personal representative of Lord Saye and Sele was not before the Court.

1792.
 FIGOT
 v.
 BULLOCK.

Mr. Lloyd and Mr. Alexander, for the plaintiff:

This demand is opposed upon two grounds; first, the restriction from sale is considered as void: secondly, the plaintiff is not considered to be the person entitled to the account. As to the first, the devisor was tenant in fee, and might devise upon any terms not illegal. The exception is not inconsistent with the thing granted, as it is only an exception of a particular thing, and therefore not like many cases at law, where the exception goes to the whole of the grant. As to the second, the party, who has a right to this account, must be either the plaintiff or the first tenant in tail as first owner of the inheritance, who is not before the Court, but is the eldest son of the plaintiff. If the underwood was now standing, being a profit of the estate, tenant for life or years impeachable for waste would have a right to cut it. The limitation to the plaintiff is without the restriction imposed on the widow. He is in the same situation, as tenant for life without impeachment of waste is *as to timber. Since *Whitfield v. Bewit*, 2 P. Will. 240, where there is a limitation in strict settlement, remainder to another person in tail, if timber is cut by wrong or fallen by accident, the first tenant of the inheritance may bring trover. But the tenant for life and remainder-man in tail cannot by agreement cut timber; if they do, this Court will lay hold of it, and will not permit them to pocket the money, but will order it to be laid for the first person entitled to the estate; *Garth v. Cotton*, 1 Ves. Sen. 524, 546; *Williams v. The Duke of Bolton*, 3 Cox's P. Will. 268, n. Supposing the bill had been filed by this plaintiff against Lady Saye and Sele and her husband for an account, according to what

[*480]

1792.
 PIGOT
 v.
 BULLOCK.

LORD HARDWICKE says in *Garth v. Cotton*, that an injunction to stay waste would be granted upon a bill by the trustees to preserve contingent remainders, the Court might have given the money to him, because it is part of his estate for life, and he might have cut it if standing, and have pocketed the money. The only way of redressing this wrong is by inquiring, to whom the injury was done; and the person injured is the plaintiff. The reason in favour of the tenant of the inheritance is, because he would be the first person entitled, if it was standing. In *Giles Bray v. Sir Paul Tracey*, 2 Cro. 688, it is said, that though in the life of tenant for life the termor by his assent might have made waste, and would not be punishable, yet after the death of tenant for life he had committed waste to the disherison of him in remainder, and then it is the same as if done after the death of the tenant for life. This though only a *dictum* is an opinion, that tenant for life without impeachment of waste has some interest in the timber.

Solicitor-General and Mr. Mitford, for the defendant :

[*481]

As to the first period the answer is, that this is a bill for an account of underwood cut above 30 years ago. No suit was brought against her husband; nor was the bill filed till 1790. A Court of Equity does not give an account for so stale a demand. Upon the other point the question is first, whether the interest in the underwood if cut was in any other person than Lady Saye and Sele; if so, secondly, whether it was in the plaintiff. This is not like the cases alluded to of reservations nor of a devise of land with regard to the effect of passing the property in the timber. In case of reservation it is in the person, who made the reservation. If a house is given with a *direction not to let a particular room in it, unless there is a devise over or a clause of forfeiture, it is nothing more than a fruitless denotation of an intent to restrain without adopting the effectual method to impose that restraint; and therefore the privileges, which are by law attached to the estate, are enjoyed with it. This cannot operate as a condition. No estate can be qualified by a condition repugnant to the estate; Co. Lit. 206, *b*. Another reason is, that no person but the heir can take advantage of a condition;

and his entry for that purpose would avoid every part of the devise. Every exception or reservation will be void for uncertainty. The underwood in this case is given to her for life : but there is a restriction upon her enjoyment of it. * * *

The effect of this devise as to the timber is to pass the property to the person, to whom the inheritance is given. If there is tenant for life impeachable for waste, he has no property in the timber except in the use of the shade. If he is not impeachable, *Lewis Bowles's* case, 11 Co. 79, establishes the direct contrary, to what is contended for; for if he makes use of his privilege during the enjoyment of his estate, he may; but it does not give him the property of timber cut wrongfully by a person having a prior estate to his. The Court has always said, that if a person cuts it by wrong, he, who has the inheritance, shall maintain trover, even though it is a case, in which he cannot maintain waste, as where there is an intervening estate for life, which prevents an action of waste, but does not prevent trover in respect of the property.

* * * In this case the underwood is not given to the tenant in tail, as timber is by force of the gift. If *timber is cut wrongfully, the person, having the property before it fell, may bring trover; but not so for the underwood in this case till sold; for it is the use, after it is cut, that is restrained; and if she had applied it to any other use, she could not have been said to have done it wrongfully. If there is not a condition, for the breach of which the heir at law might enter, and if this is to be considered as a profit arising in seven or fourteen years, which she must be said to have received for the heir at law, there could be no remedy for him, except an action for money had and received, or a bill in nature of that action; for trover upon the cutting would not lie.

1792.

 FIGOT
 v.
 BULLOCK.

[*482]

Reply :

As to the staleness of the demand, this is a fraud; and the Court has always said, that in cases of fraud there shall be relief against an executor; *Garth v. Cotton*, 3 Atk. 751. So in P. Will. it is said to be the course of the Court to give an account against the executor of the party, who cut timber wrongfully. If the plaintiff is not entitled, the party who is, is an infant, and

1792.

PIGOT

v.

BULLOCK.

therefore in time ; nor did his title accrue till her death ; and a party is not obliged to take advantage of a forfeiture, till the estate comes into possession, though he may before that. Nothing is said in the answer about the length of time. The executors are trustees for charitable purposes under her will : their only care must be, that it goes to the right person ; therefore if the Court thinks the plaintiff is not entitled, the cause ought to stand over to make the son a party. Though a devise for life with condition to take no profits is bad, yet in equity there is nothing illegal or repugnant in the condition in this case. If she had avowed her intention to sell, what she was cutting, an injunction would have been granted. If there is tenant for life without impeachment of waste, and afterwards in the same instrument voluntary waste is excepted, that restriction is good. The heir can have no title ; as he can only come, for what is not disposed of, and here the whole is given away.

BULLER, J. :

The first point is, whether there is a ground for the distinction made for the defendant as to the two periods, in which this underwood was cut. It is insisted for the defendant, that it is against conscience to call upon the executor, for the value of what was cut in the first period. I do not see anything against conscience in it ; for if she took it without right, her estate was benefited by it, and therefore ought to repay. The *whole therefore stands upon the same ground ; and the account must be, if at all, for both periods. Upon the merits there are two questions : first, whether Lady Saye and Sele is accountable to anyone ; secondly, if so, whether to the plaintiff. The first depends upon the words of the will. From the words giving her this power it seems, as if the testator, when using them, meant not to restrain any right, she should by law have by force of her estate for life, but to give her some farther right ; and as to the timber that clause does give her a farther right by directing, that she should have it, so far as she wanted it for her own use : but as to the underwood there cannot be the same construction ; for she would have had a right to cut that under the general devise without an

express power ; but the effect was to enlarge her interest. Upon the words “ not to sell ” it must be remembered, that there is no provision as to the consequence of her selling. Therefore if it stood upon the underwood only, I do not know, how it is to be considered otherwise than as a recommendation, not as stripping her of her right. Upon this I am inclined to think, she is not accountable at all. But it is not necessary to decide that, if the second point is against the plaintiff ; and that I think is against him. It is begging the question to say, this Court would have granted an injunction against her cutting timber expressly for the purpose of sale ; for this point must have been first determined ; therefore it is *idem per idem*. Then suppose an estate given without impeachment of waste except voluntary waste ; it would be good undoubtedly ; but it is not like this ; for if an estate is given for life, the addition “ without impeachment of waste ” is an addition of interest ; and it may be general, or under such restriction as the testator thinks fit. But here there is an interest given, justifying the act done ; and the words added certainly as to the underwood do not increase that interest. Another question is, whether the heir has a right to sue in this case. He can have no right. That part of the case has been answered by saying, that upon this will all the interest in the estate is disposed of some way or other. The only point remaining is, whether this tenant for life, not being tenant without impeachment of waste, has any property in the underwood cut, before his estate comes into possession. It is rightly assimilated to the case of tenant *for life without impeachment of waste, supposing it only to relate to timber, and not to underwood. Upon that it is clear, that tenant for life without impeachment of waste cannot maintain trover. That was decided in the Court of King’s Bench a few years ago upon a case reserved at the assizes upon the home circuit, and I think in Kent, which, I suppose, is not in print, or it would have been found by the counsel. There it was determined, that notwithstanding an estate for life without impeachment of waste in being, yet timber falling or cut vested immediately in the owner of the inheritance ; for tenant for life without impeachment of waste has no right to the timber cut before his possession. Then consider it as to the underwood,

1792.

PIGOT

v.

BULLOCK.

[*484]

1792.
 PIGOT
 v.
 BULLOCK.

and without the clause "without impeachment of waste." Tenant for life has a right to cut it, if he thinks fit: if he does not, it is part of the inheritance, and goes with the rest of the estate to the remainder-man. The plaintiff had no right, while she lived; therefore if she cut it, it should not go to him, but to the owner of the inheritance. The bill must therefore be dismissed with costs.

1792.
 June 19, 22.

LORDS COM-
 MISSIONERS
 EYRE, ASH-
 HURST AND
 WILSON.

[486]

BARNES v. CROWE.*

(1 Vesey Jr. 486—499.)

Republication of a will implied from a codicil referring to the will.
 The particular intent to republish need not appear.
 The Court will not execute a will partially.

TESTATOR by will, properly executed, devised all his estates in the county of Kent, that he might die seised or possessed of, to trustees, upon trust to sell them, to pay his debts, and then to apply the remaining produce to various purposes. Afterwards he purchased other lands in Kent subject to a mortgage; and covenanted in the purchase deed to pay the mortgage money; and gave a bond to indemnify the vendor. By a codicil, which he described to be a codicil to his last will and testament, he made some slight alterations in his will, and declared, that he ratified and confirmed it. The codicil was begun upon the last sheet of the will, and finished upon another sheet; and was executed in the presence of two witnesses. He afterwards made another codicil; which he began upon the last sheet of the first codicil, and finished upon another sheet; and which was executed in the presence of three witnesses. By the second codicil he revoked a bequest of five shillings per week given by the will to his father, and another legacy; and instead of the latter gave the legatee one moiety of two leasehold houses, and concluded thus: "In witness whereof I the said testator have to this my writing contained in this and part of the preceding sheet of paper, which I declare to be a farther codicil to my said last will and testament, and which is to be accepted and taken as part

* *In re Smith, Bilke v. Roper* (1890), 45 Ch. D. 632, 638.

thereof, set my hand and seal; that is to say, my hand at the bottom of the said preceding sheet, and my hand and seal to this last sheet thereof, this 28th Oct., 1788, in the presence of three witnesses."

1792.
BARNES
v.
CROWE.

Upon application of the mortgagee for payment the mortgage had been assigned for that purpose. There were two questions; first, whether the second codicil was a republication of the will so as to pass to the trustees the lands purchased after the date of the will; as to which the bill prayed a declaration by the Court to that effect, and that in that respect the trusts of the will should be carried into execution: secondly, supposing the will not republished, whether the heir, *taking those lands by descent, was entitled to have them exonerated from the mortgage by the personal assets, or was to take them *cum onere*. [The latter question is not material for the purpose of this report.]

[*487]

Solicitor-General and *Mr. Hall*, for the trustees under the will:

This codicil is annexed to the will. As to the actual annexation of a codicil it was finally settled in *Attorney-General v. Downing*, Amb. 571, that a codicil annexed, though only relating to goods and chattels, operates as a republication of a will of land. If a man seised of lands devises all his lands, and afterwards purchases more, and then makes an executor, that is not a new publication: but if he afterwards says "this shall be my will," and delivers it, that will pass the newly-purchased lands: 1 Roll. Ab. 618, s. 6, 7.† * * *

LORD COMMISSIONER EYRE:

[488]

Since the Statute of Frauds, I think, mere annexation would hardly do, being mere matter of fact and parol. A codicil, attested by three witnesses, and having reference to the will, is not within the statute.

For the trustees:

Jackson v. Hurlock, Amb. 487, relied on by Lord Camden in

† There is a *dubitatur* in Roll. Ab. to the latter branch of this proposition.

1792.
BARNES
v.
CROWE.

Attorney-General v. Downing; *Potter v. Potter*, 1 Ves. Sen. 487; *Gibson v. Lord Montfort*, 1 Ves. Sen. 485, reported in Amb. 98, by the name of *Gibson v. Rogers*. In *Copping v. Fernyhough*, 2 Bro. C. C. 291, according to the note I * took, the late LORD CHANCELLOR thought, the fact of actual annexation of a codicil executed by three witnesses, as being a republication or not, must depend upon this, whether it was done at the time of the execution, in which case he seemed to think, it would do without any reference in it to land; but he entertained great doubts, whether it would do if at any other time. It is proved in this case, that the testator knew, the codicil was added to the will, before the codicil was executed. The fact of annexation is material to distinguish this case, not for the purpose of saying that it would do alone, if all the witnesses were not capable of speaking as to the time of it. Upon these authorities the trustees think, they are entitled to have this estate purchased afterwards considered as part of the trust estate under the will.

* * *

[489]

Mr. Selwyn and Mr. Abbot, for the heir :

The second codicil, though attested by three witnesses, does not amount to a republication. The first, which is only attested by two, ratifies and confirms the will; but in the second there are no such words. This case is much stronger than the case of a codicil, attested by three witnesses, disposing of personal property only; for as it is not necessary for such a codicil to have such attestation, no other motive can be assigned for it but to republish the will: but here the testator meaning to substitute the moiety of the two houses, which property he took to be real, though it is agreed on all sides to have been only personal, in the room of the revoked legacy, it became necessary in his opinion to have it executed before three witnesses for that purpose: and that distinguishes this case. If these after-purchased lands were intended to pass, it is extraordinary, that they are not mentioned. An heir at law is a favourite both in this Court and Courts of Law; and they will not disinherit him without express words or a clear intent. In *Attorney-General v. Downing*

* The Solicitor-General.

the codicil was expressly held not to be a republication, because there was nothing in it shewing an intention to republish. In this case there is nothing shewing such intention, unless a mere reference is sufficient for that: but none of the cases ever went so far as to determine, that a mere reference by a codicil, attested by three witnesses, is sufficient. In **Acherly v. Vernon*, which went to the Lords, there were words of confirmation. In 1 Ves. Sen. 494, Lord HARDWICKE, stating *Lytton v. Lady Falkland*, says, the annexation can make no difference, for all codicils are by law fastened to the will. In *Cholmondeley v. Cholmondeley*, cited 1 Ves. Sen. 489, the codicil did not pass lands purchased after the date of the will. * * *

1792.
BARNES
v.
CROWE.

[*490]

Mr. Mitford and Mr. Alexander, for the devisees :

[491]

It is necessary to distinguish between cases previous to and since the statute. Since that time a republication must be by some act attested by three witnesses. But still there is an analogy in reasoning upon the subject. There is no contradiction among the cases ; but all go to this ; since the statute there must *be a clear intention, that the will shall have operation at the time of the execution of the codicil in the presence of three witnesses. That shall be a republication by force of the codicil and its reference to the will. In *Jackson v. Hurlock* from a note of Mr. Emlyn Lord NORTHINGTON said, that a reference to the will is the same thing as a recital of it ; though that is not mentioned in Ambler's report of that case. * * * It was admitted in *Gibson v. Lord Montfort*, that, if there were words of confirmation, that would do. The words there were, "I desire, this writing shall be part of my will ;" between which and an express confirmation, the CHANCELLOR said, there was very little difference. * * *

[*492]

[493]

LORD COMMISSIONER EYRE delivered the opinion of the Court :

June 22.

This cause stood over, that the Court might look into the cases, and particularly *Acherly v. Vernon*, and the *Attorney-General v. Downing*. Upon looking into those cases the question, if it is not to be considered as determined, and so determined as that the Court can hardly consider itself at liberty now to review it,

[495]

1792.

BARNES

c.

CROWE,

[*496]

would be a question of great difficulty ; for it seems to me, that these two cases are in direct opposition to each other. The latter was determined by a very able Judge in this Court, and having the former before him ; which increases the difficulty : but it seems to me upon the best consideration, that the former case is so determined, and is of such authority, that every thing must yield to it. Therefore, unless it can fairly be distinguished, notwithstanding the great authority of the other the point must be considered as decided by the first. That was a case of the highest authority ; as it was originally determined here by Lord MACCLESFIELD ; and his decree was affirmed by the House of Lords after questions put to all the Judges. In that case the codicil was held to amount to a republication of the will upon *these grounds : first, that it expressly ratified and confirmed the will ; next, that it was incorporated into the will ; and both, it was said, made but one will. It seems to me to be a conclusion from thence, that the publication of the codicil in the presence of three witnesses was therefore a republication of the will. The reporter states, that four cases were cited in the argument of that case, two of which appear to me to deserve particular attention ; which are *Lytton v. Lady Falkland* and *Penphrase v. Lord Lansdown*. In the first the words of the codicil were, “ I make this, which I will shall be added to and make part of my last will, which I have formerly made : ” Lord COWPER assisted by Sir JOHN TREVOR, Master of the Rolls, Lord Chief Justice TREVOR, and Mr. Justice TRACY, decreed, that it was no republication, and argued it thus ; that since the Statute of Frauds there can be no devise of lands by an implied republication ; for the paper, in which a devise of lands is contained, ought to be re-executed in the presence of three witnesses. This was decreed upon the 16th of June, 1708. The other case was in Hilary Term, 11 Anne ; and a correct state of the facts of it was taken from the special verdict on the roll. It was a trial at bar. John Earl of Bath, made his will in 1684 ; and afterwards upon the 15th of August, 1701, sent for seven persons ; and said he sent for them to be witnesses of his will, and sometimes to be witnesses of the republication of his will. He took the codicil in one hand and the will in the other ; and said, “ this is my

will and I publish this codicil as part thereof ;" and signed the codicil, which lay upon the table with the will, in the presence of the witnesses ; who subscribed it in his presence. By the codicil he referred to the will ; saying, he did not intend wholly to revoke it ; but devised by the codicil as follows, directing it to be taken as part of his will. He then made several devises and bequests. He put the will and codicil into a sheet of paper, and sealed them up in the presence of the witnesses ; but the will was not unfolded before the witnesses ; nor did they sign it, but the codicil only. These were strong circumstances to make it a republication from the manifest reference to the will, the expression, that the codicil was to be taken as part of it, and all that annexation of which so much was made in the *Attorney-General v. Downing* : yet it was taken by Lord PARKER, then Chief Justice, and the whole Court of King's Bench, that it was not a republication ; as since the statute that could not be by implication, but the will must be re-executed. After this opinion upon the importunity of the defendant a special verdict was found ; and it is not said in the report, what became of it. Here is a rule of construction upon the Statute of Frauds clearly expressed, and laid down by the first men of their time ; that is, that since the statute there can be no republication by implication, that nothing short of re-execution will do. In *Acherly v. Vernon*, 10 Geo. I., it is manifest, that Lord MACCLESFIELD did not adhere to the rule, he when Chief Justice laid down in *Penphrase v. Lord Lansdown* ; for there was held to be a republication without re-execution, and consequently by implication. If the rule laid down by Lord COWPER, assisted by the MASTER OF THE ROLLS and the Judges, and by Lord MACCLESFIELD, assisted by the rest of the Court of King's Bench, when he sat there, was not sound, and if all implication is not to be rejected, and if any thing short of re-execution can be admitted, I am not surprised, that in *Gibson v. Lord Montfort*, Lord HARDWICKE was satisfied with the special ground, upon which it was argued before him, that a codicil, executed in the presence of three witnesses, might be a republication, and that he felt himself inclined, that it should. If we disentangle ourselves from the rule, that there shall be no republication without re-execution, the principle,

1792.
BARNES
v.
CROWE.

[497]

1792.
BARNES
v.
CROWE.

[*498]

that a codicil, attested by three witnesses, shall be a republication, seems intelligible and clear. The testator's acknowledgment of his former will, considered as his will at the execution of the codicil, if not directly expressed in that instrument, must be implied from the nature of the instrument itself; as by the nature of it it supposes a former will, refers to it, and becomes part of it; and, being attested by three witnesses, his implied declaration and acknowledgment seems also to be attested by three. Before the statute it was no part of the essence of the obligation, that the will should be re-executed. Anything, that expressed the testator's intention, that the will should be considered as of a subsequent date, was sufficient. Since the statute re-execution of the will is not necessary; but nothing more is required than a writing, according to the provisions of that statute, expressing that intent. Therefore Lord HARDWICKE might well say, he saw no great difference between the words "I desire this codicil may be part of my will," and the words "I republish;" which, it was there admitted, would have done. In the *Attorney-General v. Downing*, Lord CAMDEN supposed, a particular intent to republish ought to appear; and that annexation or particular expressions in the codicil would demonstrate that intention. If that was necessary, not only Lord HARDWICKE's *opinion cannot stand, but neither can *Acherly v. Vernon*; for there was no particular intent to republish; but the testator referred to the will, made alterations, and gave sufficient demonstration, that when making and executing the codicil he considered the will as his will; and from that a republication was implied; but it was not particularly in his thoughts to do any formal act of republication. Upon considering these cases I confess, I am inclined to stand upon the general proposition stated by Lord HARDWICKE to shew, the will in the case before us was republished. This case has auxiliary circumstances, which might seem to bring it within the *Attorney-General v. Downing*; for the testator expressly declared by the original will, that he meant it to operate upon all the lands, he should die seised or possessed of. If he has not actually incorporated them together, he has inseparably annexed the codicil to the will, not by a wafer, or wrapper, or anything *dehors* the instrument: but by

what I called internal annexation, and that of such a kind that all the papers taken together may be considered as published, when the codicil was executed. But I am afraid to rely upon these circumstances for fear of entrenching upon the statute by raising evidence out of circumstances in their nature parol. The general ground is safer and better.

1792.
BARNES
v.
CROWE.

The next question is, what will be the consequence as to this case : and here there is a doubt upon my mind. The prayer of this bill seems to go simply to ask a declaration from the Court as to this codicil being a republication for the single purpose of the Court acting upon the estate, which was acquired after publication of the will, and not to enable the Court to execute the general trusts of this will altogether. I doubt, whether that is according to the usual course. The Court will not take up causes by parts in that manner : and these parties not asking a general execution of the trusts of the will seem to me to have no business here. They might have tried the question of republication by ejectment at law. If the Court had been of opinion that there was no republication, then a question of equity would have arisen. The words "in that respect" in the prayer of the bill mean as to that estate. As to the general prayer, perhaps we have not all parties before the Court.

For the Plaintiffs:

It was then said, that all the parties were before the Court ; and that the pleadings stated, that the heir was in possession, and *that the trustees were carrying the trusts into execution, [*499] but were prevented by this question.

LORD COMMISSIONER EYRE :

Then declare the will well proved, and the trusts to be carried into execution with the usual directions ; and that the codicil is a republication of the will, and that the after-purchased lands shall pass, and that all parties shall have their costs : and reserve the consideration as to the surplus of the real and personal, and subsequent costs. * * *

1792.

July 6.

THURLOW,
L.C.

! [512]

BINFORD v. BAWDEN.†

(1 Vesey Jr. 511—512.)

Wife examined on commission apart from husband as to the disposition of money devised to be laid out in land for her in tail, reversion to her in fee, whether to be received in money or laid out as directed.

MONEY was devised to be laid out in land for a *fême covert* in tail with reversion to her in fee. For the plaintiff it was prayed, as according to the usual course of the Court in these cases, that she should be examined by commission, apart from her husband, as to her inclination with regard to the disposition of the money; and that, if she chose to take it in money, it should be paid to her.

LORD COMMISSIONER EYRE :

It is clear, the Court would do it in case of a person *sui juris*. It is equally clear, they would refuse it in case of an infant. I want to know, whether there is any case shewing what the Court does in the case of a *fême covert*.

Mr. Mitford said, there was no case expressly deciding the point; but that in *Cunningham v. Moody*, 1 Ves. 174, Lord HARDWICKE says she must come into Court to consent or be examined upon commission.

LORD COMMISSIONER EYRE :

Declare, that she is entitled to this sum in the pleadings mentioned; and let a commission be awarded to examine her separate and apart from her husband touching the disposition of the said sum, whether she will have it laid out in land, or receive it in money; and reserve all farther directions; because it will then be necessary, if she elects to take it in money, to inquire whether she has a settlement.

† *Standerling v. Hall* (1879) 11 Ch. D. 652, 655; 48 L. J. Ch. 382.

MORGAN v. MATHER.†

(2 Vesey Jr. 15—22.)

1792.
Nov. 21.

—
EYRE,
ASHHURST,
& WILSON,
Lords Com-
missioners.

[15]

Award upon a general reference cannot be impeached for erroneous judgment upon facts; but may for corruption, misbehaviour, excess of power, and mistake admitted by the arbitrators: in the three first cases there must be satisfactory evidence against them; for the Court favours awards.

Award contrary to law may be impeached; for that is excess of power.

Award not to be impeached for allowing compound interest; for it may be allowed in case of a contract for it either express or to be inferred from the nature of the dealings between the parties; as if it is according to the course of their trade; therefore it is a conclusion of fact, on which the judgment of the arbitrators is final; but this doctrine as to interest has no relation to mortgages.

IN this cause an award was made under a general order of reference of all matters in dispute, and no exceptions to be taken. Upon cross motions to confirm and set aside the award several objections were made to it by the plaintiff, some of which were given up, as relating to mere matter of fact; upon which, therefore, no fraud being imputed, the decision of the arbitrators was final: but four were relied on. First, it was objected, that the arbitrators had allowed the defendant compound interest upon the settlement of an account current of several years without annual rests. The second objection arose on this transaction; the plaintiff drew several bills of exchange to the amount of 11,000*l.* in favour of M'Crackett and Co. upon the defendant; and sent them to the defendant; who accepted them; and the objection was, that the arbitrators had allowed the defendant to set off the value of them, as having been paid on account of the plaintiff to M'Crackett and Co., without having delivered them up, or any discharge or indemnity given in respect of them to the plaintiff; who continued liable as drawer; and alleged, that he apprehended, and was threatened with, suits in respect of them. The defendant admitted that he did not actually pay these bill: but said, that in his accounts with M'Crackett and

† *Re Whiteley and Roberts' Arb.*, '91, 1 Ch. 558, 566.

1792.
MORGAN
v.
MATHER.

Co. he gave them credit for the amount ; and that the bills had been delivered up to him with full discharges upon them. The last of the bills was drawn about twelve years before the award was made.

[16]

The third objection was, that between the years 1770 and 1780 the plaintiff having empowered the defendant to make insurances for him, the arbitrators had charged the plaintiff with several premiums without having had the policies produced to them. Upon this point by the affidavit for the plaintiff it was sworn, that "it was acknowledged, that in many instances insurances were made without any policy being actually effected, but merely by entry in the defendant's books." In answer to this it was sworn, that "it was not acknowledged, that in many instances, &c." (pursuing the words of the affidavit on the other side) but that the policies were regularly effected ; and the broker regularly charged ; and the arbitrators were satisfied.

The fourth objection was that the arbitrators had allowed the defendant to give himself nine months' credit in respect of a sum of 9,000*l* being the amount of an average loss adjusted and paid by the several underwriters to the defendant on account of the plaintiff : whereas according to the usage nine months' credit is to be given for premiums ; but a loss is to be paid immediately on adjustment.

LORD COMMISSIONER EYRE :

Upon the point relative to the compound interest I have hesitated a good deal. Would there be any objection to desiring the arbitrators to certify, whether any annual accounts were transmitted by the defendant ; and how many ? and whether the books were balanced every year, or no ? About any other part of the case I have no doubt ; and have no objection to dismiss all the rest of it now. As to the bills, it is only a question of fact, whether the defendant is entitled to take credit in the account between these parties for the amount of the bills, as having been paid by him the acceptor on account of the drawer. That is a mere question of fact ; and where arbitrators cannot be charged with misconduct or corruption, as in not

hearing evidence, &c. it is their province to decide, and to draw their conclusions from the facts before them; and in this instance I think, they did right. As to the indemnity, that perhaps might be contrived by the Court consistent with the award: but, if not, it must go without indemnity. It is not necessary, if the fact is, that this man has paid the bills. As to the question of the politics, whether for want of the policy the defendant shall be *at liberty to charge his premium, in inquiring into transactions, closed many years ago, which happened between the years 1770 and 1780, it is peevish to inquire, whether policies were actually taken out, or not, if there is no question, that the premiums are fairly charged. I am not inclined to allow premiums to be charged without policies: but in this case I must have the most direct evidence of the fact. Here there is room to suspect, the fact might not be so: there is no direct evidence. One witness says, it was acknowledged to have been done in many instances; and that is answered by a denial in the words of the charge, and not a positive denial of the fact: but they say, they were regularly done, and the broker regularly charged, and the arbitrators were satisfied. The affidavits are not perfectly satisfactorily: but they ought to be satisfactory the other way to convict the arbitrators of having acted in this instance contrary to law. Therefore I will not suppose, that there were no policies. As to the next objection, from what time this 9,000*l.* ought to have been carried to the account of the defendant, it is matter of fact, whether it was received, and when. I believe the arbitrators have rather cut this Gordian knot, then untied it; and have taken a middle course, which satisfied their judgment: but the question before me is, whether it was upon fact or law; and I do not think upon the whole, they have decided it wrong. I am satisfied as to that, at least so as not to disturb it. As to the question of interest, I have a difficulty. I am satisfied as to the argument, that it is fair and necessary to have an interest account every year: but whether, if there is no express settlement, it ought not to be carried on as interest, instead of being made capital, I have doubts.

1792.

MORGAN
v.
MATHER.

[*17]

1792.

LORD COMMISSIONER ASHHURST :

MORGAN
v.
MATHER.

[*18]

The practice of submission to arbitration is very beneficial to the parties ; and therefore the Court ought not to be severe upon arbitrators, but ought to make every intendment to substantiate the award. As to the facts the arbitrators are judges chosen by the parties themselves ; and whether we should have drawn the same conclusion is not the question. All the objections, except that as to the compound interest, fall within that description. As to the bills, it appears, the last was drawn above twelve years ago. It is objected, that the bills themselves are not forthcoming, nor any receipt in respect of them. If the *arbitrators have drawn their conclusion, after such a length of time, the plaintiff not having been called upon, it is a fair conclusion, that they have been properly adjusted. If these bills in the hands of the defendant were set off, it is in nature of payment. Had any of them been dishonoured, the plaintiff would have known it ; for he would have been called upon. But he does not affect to say, he has been called upon ; therefore it is a fair conclusion, that has been drawn, that they were all satisfied ; and of course the defendant has a right to place them to his debit, as money paid on his account. As to the policies I agree, if any one instance was pointed out, and it was proved, that he had made himself the underwriter, and had not effected any policy, the Court ought to lay their hand upon it on account of the evasion of the stamp duty : but we must have positive proof. As to the adjustment of the loss, the arbitrators do not seem to have taken into their consideration, at what time the particular sums paid upon that loss were paid : but they have established a general rule ; and supposed that all premiums and losses were adjusted at the end of nine months ; and if so, we cannot impeach the award upon that. As to the compound interest, it is a matter of great consequence to the public commerce of the kingdom. We ought to look into the cases ; and it is proper to make the reference to the arbitrators, which has been proposed.

LORD COMMISSIONER WILSON :

I have only to declare my concurrence. It would be a

melancholy thing, if, because we differed from the arbitrators in points of fact, we should set aside awards. The only grounds for that are, first that the arbitrators have awarded what was out of their power ; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption, as if without reason they will not hear a witness ; thirdly, that they have proceeded upon mere mistake, which they themselves admit. I am of opinion, that when any thing is submitted to arbitration, the arbitrators cannot award contrary to law ; as that is beyond their power ; for the parties intend to submit to them only the legal consequences of their transactions and engagements. Those are all the grounds for setting aside awards. But in this case they have acted right. In a bill filed by M'Crackett against Mather it is stated, that they were partners : then, when the bills were delivered *to Mather, that was a delivery to M'Crackett. As to the question of policies of insurance, I understood, that if it was in form signed on paper unstamped, the party on paying the penalty might get it stamped, and give it in evidence. I remember a case, in which a man had an insurance upon a ship for a month, which before the end of the month was renewed for another month by indorsement, and so on by four successive indorsements : the question was, whether the ship was lost on the last day of the policy or the day after : all these indorsements were without stamps : at first they were read as new insurances : it was tried, I think, four times ; and the underwriters always had a verdict. At last I suppose thinking the conduct of this man rather vexatious, they took the objection, that these indorsements were made without stamps ; and then the plaintiff got them stamped. If that is so, it might be a question, whether these arbitrators, who may take the oath of the party, might not be satisfied by other evidence than the stamped paper, that there were insurances. However in this instance there is a great deal of evidence, that in general, if not in every instance, policies were actually effected ; therefore it is too much to say, the arbitrators have done wrong, in deciding upon it. As to the sum of 9,000*l.* it is evident, it would not be all received at once, but by degrees ; therefore, there was a difficulty about that ; and the arbitrators

1792.
MORGAN
v.
MATHER.

[*19]

1792.
 MORGAN
 v.
 MATHER.

said, that, as they allowed nine months' credit to the plaintiff in one case, they would allow the same time to the defendant in the other.

A few days afterwards the Counsel for the plaintiff asked the Court whether they meant, when they gave their opinion in this case, to make any order of reference to the arbitrators upon the subject of the compound interest, and of what nature.

Lord Commissioner EYRE said, the Court would not make any order without consent : but that they wished to know for their own satisfaction, whether annual accounts had been transmitted to the plaintiff; and whether the books of the defendant were balanced every year in his handwriting.

[20] The Counsel for the plaintiff declining to consent, no order was made : but in consequence of what had fallen from the Court on the question of compound interest the arbitrators made a certificate, in which instead of giving a short answer to the question, whether annual accounts had been transmitted to the plaintiff; and whether the books of the defendant had been balanced by him annually, they went into a long history of their conduct; on which account the Court would not read the certificate.

On the 8th of December *Mr. Mansfield*, for the defendant, prayed the final opinion of the Court, upon the question of compound interest.

LORD COMMISSIONER EYRE :

I am ready to give my opinion now without an answer from the arbitrators upon the question, which I wished to have referred to them. When this came on before, I did not know, upon what ground the case of *Hankey's house*† before Lord

† 3 Bro. C. C. 504; no question upon compound interest appears in that report.

ThurLOW proceeded: but having read the Chancellor's opinion in that case and considered the subject more, I think now, we have nothing to do with that inquiry. There Lord THURLOW said, that compound interest was never to be allowed but upon the ground of the contract between the parties to allow it, either an express contract, or to be inferred from the nature of their dealings; as if it was the course of the trade, in which they were engaged, that compound interest should be allowed; and thence to be inferred, that it was their intention to allow it. Therefore my apprehension is, that the arbitrators have examined the nature of the dealings between the parties, and have decided this as a question of fact, that it ought to be allowed; and I am satisfied, the judgment of the arbitrators ought to conclude. In *Hankey's* case Lord THURLOW appears to have drawn the inference of fact from the accounts being annually settled: but in this case the moment this is established as a question of fact and contract, this Court has nothing to do with it; but it is to be determined by the arbitrators, whose decisions we cannot review in matters of fact. My difficulty was, whether any rule of law stood in the way. Lord THURLOW very sensibly puts it, not upon that, but upon mere matter of fact, whether it was part of the original contract, or no. It must be made out to be so either from a specific contract, or inferred from the usage of *the trade, &c. I have no doubt, there may be a previous contract for compound interest. The LORD CHANCELLOR exercised his judgment upon the fact, as it appeared. He drew the conclusion of fact. That being so, I say, that in this case it was within the province of the arbitrators to draw the conclusion of fact; therefore we cannot inquire about it. The Court does not take upon itself to inquire, whether the arbitrators have judged right or wrong upon facts. If it was a conclusion of law, we would inquire.

1792.
MORGAN
v.
MATHER.

[*21]

LORD COMMISSIONER ASHHURST :

I am also of opinion, that this is a question for the decision of the arbitrators. Compound interest may be allowed, where there is a contract for it, or where it is the usage of the trade.

1792.

LORD COMMISSIONER WILSON :

MORGAN
v.
MATHER.

When this cause came on before, I was of opinion, that this was a question for the judgment of the arbitrators ; that, as compound interest was not an unlawful thing in itself, it was a question of fact, whether in that particular trade, or in any trade, it was to take place, or no.

Lord Commissioner EYRE desired it to be observed, that the Court was not to be understood to have laid down any thing upon this subject of interest, that has relation to mortgages.

1793.

March 9.

The *Attorney-General* † made a motion to set aside the award in nature of a rehearing from the decision of the Lords Commissioners upon the same objections.

For the motion it was insisted, that if it could be shewn, that the arbitrators were grossly mistaken in point of fact, though it should not be raised as high as fraud, it would be sufficient to set aside the award.

[22]

The Counsel in support of the award were stopped by the Court.

LORD CHANCELLOR‡ :

I have no authority to review the proceedings of the arbitrators. All the matters before them were within the compass of the submission. All the argument is upon error and mistake : but you have not stated corruption, misbehaviour, or excess of power, which are the only three grounds I know for setting aside awards. I cannot know the ground, upon which the arbitrators have proceeded. No part of their conduct is impeached. I must first presume, they went upon a particular ground, without any thing appearing upon the award to shew, on what ground they went, and then upon that determine, that they have acted contrary to law. Suppose it evidently appears from the accounts annexed, that the arbitrators by mistake of calculation have awarded a sum different from the result of the figures ; I cannot deal with that upon motion, if no corruption is charged. It

† Sir John Scott.

‡ Lord Loughborough.

would be another question, what the Court would do as to enforcing an award by attachment in a case of evident mistake. If parties litigating consent to take arbitrators instead of a master, they may: but if they agree to refer the whole matter to judges of their own choice, I cannot correct the error of their judgment: but one of those three grounds must be made out. As to the bills, the arbitrators understood, that, when the balance was paid, the bills would be delivered up: that was the reason, they gave no idemnity. There is no ground for the motion

1793.
MORGAN
v.
MATHER.

ABEL *v.* HEATHCOTE.†

(2 Vesey Jr. 98—101.)

Partition of an estate in common a good execution of a power to sell or exchange.

The estate of a tenant in common cannot be so settled on marriage of one as to prevent the right of the others to make partition.

1793.
April 10.
LOUGH-
BOROUGH,
L.C.
[98]

THIS bill was for specific performance of an agreement for sale of an estate by the plaintiff to the defendant. The Master reported that a good title could be made. The defendant excepted. The objection to the title was, that the premises were held under a partition, made in consequence of a decree, by the trustees under a power in a settlement to sell or exchange; and that, as no express power to make partition was given, that decree was erroneous. The premises settled were one undivided third of an estate held in common. The proviso in the deed, upon which the objection arose, was to this effect: "that it shall be lawful for the trustees, &c. during the lives of the husband and wife and the survivor with their consent to make sale of, and to convey, surrender, and assure, or convey in exchange for or in lieu of other manors, lands, and *hereditaments, in England, the said undivided third part of all or any of the said freehold, or copyhold, or customary manors, lands and hereditaments, rights, members, and appurtenances, to any person either together or in parcels for the best price or valuable consideration

[*99]

† *In re Frith and Osborne* (1876), 3 Ch. D. 618, 621; 45 L. J. Ch. 780.

1793.
 ABEL
 "f.
 HEATHCOTE

in money or such other equivalent interest in manors, lands, and hereditaments, as to them the trustees with such consent shall seem proper; and that they with such consent may revoke, determine, and make void the uses of the settlement, and convey to the purchaser or person making exchange; or limit such other new uses, as shall be requisite to effect such sale, disposition or exchange, as aforesaid."

This exception was argued before the late Lords Commissioners of the Great Seal; who had great doubts upon the point; and, there being some difference of opinion, they, on the day of their resignation declined to decide it; and recommended another argument.

Solicitor-General, and Mr. Nedham, for the exception:

This power cannot extend to a partition. It is very common to insert a power to make partition; which is a strong proof, that it is necessary. None of the words, used in this clause, apply to a partition; but all of them are exhausted by operations distinct from that. Every power of this kind, which is in direct derogation of the settlement, must be construed strictly; if not, very considerable danger will arise. The decree therefore is erroneous; and may be reversed on bill of review.

Attorney-General, Mr. Mansfield, and Mr. Stanley, for the report:

This purchaser can have a complete legal title. A power of this sort is given for melioration of the estate; to enable the parties to do such acts, as will make the most of it. This power to exchange does not mean a strict exchange at common law; for which the word "exchange" is necessary: but, even if it is to be considered as a power to make a common law exchange, I do not see, why taking a divided for an undivided part would not do. For that it is not necessary, that there should be acre for acre; but rent may be taken for land, &c. Perkins states many cases of that kind. Such powers as these are to be most liberally *expounded in favour of the intention. Suppose these persons had joined with the other tenants in common in a sale of the whole estate, and had then purchased with the equivalent one-

third of the same estate, would not that be a good exchange? This is not precisely the same thing; but is the same effect, produced by more simple means.

1793.
ABEL
v.
HEATHCOTE.

LORD CHANCELLOR :

There was no occasion to give the trustees power to make partition. The estate of a tenant in common cannot be so settled upon the marriage of one as to prevent the right of the others to make partition. Supposing this partition not made so as to pass the legal estate of an undivided third, you do not contend, that it will not stand as a good partition in equity.

For the exception :

It is not a good partition in equity according to the situation of the parties.

LORD CHANCELLOR :

I am clearly of opinion especially upon some late determinations, that a purchaser must have the legal estate ; and is not to be compelled to take an equitable estate.

For the report :

There are many cases, in which the Court will compel a purchaser to take an equitable title ; thus far at least, till a legal title can be made ; as in the case of an infant.

LORD CHANCELLOR :

Suppose this partition liable to objection as to the execution of this power ; still the plaintiff had the legal estate. But the defendant has the estate the plaintiff had ; who has conveyed all his estate to him. Supposing the partition is good, the defendant has the legal estate in one third. Supposing it not good, the plaintiff having been before the partition tenant in common of the legal estate, undivided, the defendant has in his right the legal estate ; which runs over the whole estate ; and therefore can support an ejectment for the whole ; for whoever impeaches *his title must do it upon the ground that the partition

1793.

ABEL

v.

HEATHCOTE.

is invalid ; and then the parties are remitted to their old rights. It would be sufficient to enable him to keep himself in Court, and not be nonsuited in an ejectment.

The question before me is the question, submitted by the report, whether within the limits of this power the partition is not an exchange. If the question was asked of me, whether a partition was not in the view of the parties, I should be obliged to answer, that it was ; for there is a supposition here, that the interest, vested by this settlement might be sold by parcels. Though there is some distinction between a partition and an exchange, their consequences and effects as to the interests of the parties are precisely the same. If any person had been ingenious enough to think of this objection at the time of the partition, by making the trustees sell, receive the money, and buy a third of the same estate, the whole would have been within the words of the power. They revoked the uses in order to acquire a divided third of the estate ; which they have taken in lieu of the undivided part. They might have taken money, rent, land, any where else. It is in effect clearly, though not literally, within this power. The exception must be over-ruled.

1793.

April 18 & 20.

LOUGH-
BOROUGH,
L.C.
[101]

LANGSTON v. BOYLSTON.†

(2 Vesey Jr. 101—111.)

Collusion not to be presumed against the affidavit of the plaintiff in interpleading bill ; nor can counter affidavit prevail against it.

[THIS was a bill of interpleader by bankers with whom property had been deposited for safe custody. The owner of such property was in prison under actions brought against him as partner in an insolvent mercantile house, and the bankers refused to deliver up the property to him. The owner thereupon brought an action of trover against the bankers, who filed this bill and made the usual affidavit denying collusion, and moved for an injunction to restrain the defendant from proceeding in

† *Manby v. Robinson* (1869), L. R. 4 Ch. 347, 349 ; 38 L. J. Ch. 309.

trover. The defendant by his answer charged the plaintiffs with collusion with the persons under whose actions the defendant was in prison.

1793.
LANGSTON
v.
BOYLSTON.

The case does not require any special attention except in respect of the following passage in the judgment of the Lord Chancellor.] * * *

LORD CHANCELLOR :

[108]

* * * As to the circumstances, no stress can be laid upon the allegation, that there is collusion on the part of the plaintiffs. They did not collude; and I must *take it for granted, that they did not. Where the course of the Court is, that the party must make affidavit, that there is no collusion, I cannot presume that to be false; for if it is false, he is liable to a prosecution: much less can I determine it to be false upon a counter affidavit. * * *

[*110]

TATE, MARY v. HILBERT.

TATE, JANE v. HILBERT.†

(2 Vesey Jr. 111—122.)

1793.
March 28,
April 22.

LOUGH-
BOROUGH,
L.C.
[111]

An absolute gift, to take effect immediately, cannot be considered as *donatio mortis causæ*; therefore such gift of a common cheque on a banker, payable to bearer, and of a promissory note, held not to be *donatio mortis causæ* or an appointment or disposition in nature of it; and not capable of any greater effect in equity than at law: as to the cheque the bill was dismissed without prejudice to any action; as to the note, it being doubted whether an action would lie against the executor for want of consideration, the Court offered to retain the bill, if an account was necessary.

THE plaintiffs in these causes were relations of Mark Bell: Jane his niece; and Mary his great niece. The object of the first bill was to have a banker's cheque for 200*l.* paid, *either out of 800*l.* cash belonging to Mark Bell in his banker's hands at the time of his decease, and admitted by the defendant, the

[*112]

† *Rolls v. Pearce* (1877), 5 Ch. D. 730, 732.

1793.
TATE
v.
HILBERT.

executor, to have been possessed by him, or out of his general assets. The cheque was in this form :—

“ Pay to self or bearer 200*l*. ”

“ MARK BELL.”

The other bill was to have payment of a promissory note, for 1,000*l*. to the plaintiff Jane, signed by Mark Bell. These claims were made upon the footing of *donatio mortis causâ*, or as appointments in nature of it. Mark Bell by his will, made in November, 1789, gave to the plaintiff Mary a legacy of 500*l*. and to the plaintiff Jane a legacy of 100*l*. and an annuity jointly with his sister for the lives of them and the survivor. He made several other bequests to a great amount ; but gave the bulk of his fortune to his son ; who afterwards became a lunatic. The transaction of the gifts to the plaintiffs, who were mutually evidence for each other, rested solely on their testimony ; as no other person was present at the time. On their testimony it stood thus : “ The testator sent for Mary Tate from London to his house at Battersea. On 25th January, 1790, he observed, that he was worth more than he thought ; that his fortune was too much for one person ; and therefore he would give away more than he had given by his will. He then desired Jane to give him out of his desk several bonds and securities to the amount of upwards of 3,000*l*. which he cancelled by tearing off the seals. He then told Mary, he would give her 200*l*. ; and desired Jane to give him a cheque out of the drawer of his desk ; which she did ; and he immediately filled it up, signed it, and gave it to the plaintiff Mary. This was the cheque, upon which the first bill was founded. At the same time he gave the plaintiff Jane the promissory note for 1,000*l*. which was the subject of the other. The testator was infirm, but of sound mind at the time ; and was not pressed or asked by either of the plaintiffs to do any thing for them.”

On January 26th the testator made two codicils ; by one of which he revoked a devise to a nephew ; and gave a legacy in lieu of it ; and gave some diamonds, furniture, plate, &c. In the other he mentioned, that he had cancelled debts due to him from his two nephews ; which were the securities he had

according to the evidence of the plaintiffs cancelled the preceding day. The codicil expressed his intention by that cancellation to release those debts; and it also discharged other debts from *other relations. Neither codicil took notice of the transaction of the preceding day, on which these bills were founded. The testator died four days after the codicils were made. He was eighty-three years old and very infirm; but there was no evidence of any particular illness.

1793.
TATE
v.
HILBERT.
[*113]

Solicitor-General and Mr. Hollist, for the plaintiffs:

This is a disposition in nature of *donatio mortis causâ*: The circumstances shew an intention of the same kind as in *Lawson v. Lawson*, 1 P. Will. 441, to add to the disposition, the testator had made by his will for the plaintiffs. It may be taken according to the expression of the Master of the Rolls in that case as an appointment and direction to his executor to pay. The gift of the cheque was an immediate appointment of so much money in the hands of the banker. The title was completely vested during the life of the testator. Nothing could have divested it. That the plaintiff did not go to receive it, as she might have done, made no difference as to the title. This is within the first of the three definitions of *donatio mortis causâ* in Swinburne, 22; namely, where the giver is not terrified by fear of any present peril: but moved by the general idea of man's mortality. That cannot be revoked, if not fraudulent; being in nature of a gift. So is the second. The third is like a legacy. * * *

Mr. Mansfield and Mr. Campbell, for the defendant:

As to the first bill, this is argued to be a species of appointment in nature of a *donatio mortis causâ*. There is no such description to be found in any case except the word "appointment" in *Lawson v. Lawson*. This is not in any respect like an appointment. It is a draft, not given in contemplation of death, or to be paid after death. By the accident of his death before *the money was received, it is gone. It is the essence of *donatio mortis causâ*, that the gift should be in contemplation of death. There is no such thing in this transaction. The way, in which he chose to give this money to Mary, shews, it was not

[*114]

1793.
TATE
v.
HILBERT.

in contemplation of death ; as it was an immediate gift. This is not like *Lawson v. Lawson* ; where the donor was languishing in sickness, and had death before his eyes. In *Ward v. Turner*, 2 Ves. Sen. 431, the great case on the subject, in which the doctrine was much gone into, Lord HARDWICKE says, he does not know what to make of *Lawson v. Lawson*. * * * The plaintiff cannot prevail ; as it was given not in contemplation of death ; but was an immediate gift ; nor can it operate as an appointment ; as every writing of that kind is like a legacy ; and has no operation, unless proved in the Ecclesiastical Court.

[116]

As to the second cause, it is impossible to support that. It is a promissory note, if any thing, without any consideration ; *Baldwin v. Webb* before Lord Kenyon, when Master of the Rolls.

LORD CHANCELLOR :

If this cheque had been given in payment of a debt, and the creditor had not carried it in until after the death of the testator, could the creditor, who had not presented it, insist, that the executor should let him take the specific money in the banker's hands ?

For the Plaintiffs :

No : but if the plaintiff had transferred it to a third person, the holder might have brought an action upon it against the executor.

LORD CHANCELLOR :

Yes ; and why does not the plaintiff bring an action ? What hinders her from recovering at law ?

For the Plaintiffs :

On taking opinions of common lawyers she was advised, that her remedy was in this Court, and that she could not recover in an action.

LORD CHANCELLOR :

It does not appear to me, that she cannot recover upon it. It would be no objection to an action, that she had given no value.

Suppose, she had paid it away. There is nothing so common in general commerce, as these bills circulating for a long time. I know, they do for six or seven months. I do not think it so clear, as it seems to have been taken, that an action will not lie by the holder against the executor. Those drafts go in common rotation through a hundred hands. If there can be no action at law, if there is no legal right, I doubt, whether you can make it out here. The difficulty upon it is, that it cannot be *donatio mortis causâ*; as it was to take effect immediately, and not to wait for the death. There was no immediate *relation to the death: but she might have gone instantly to receive it. I do not understand the first description of *donatio mortis causâ* in Swinburne. According to that every gift would be a gift in case of death; for every one must die. I see, he goes on to say, the last is compared to a legacy; but the two first are reputed simple gifts; and cannot be revoked. If the accident of the testator's death makes this ineffectual at law, I do not see, how I can do otherwise with it in this Court. I wish, I could support it; but I cannot upon the capricious reasoning: that I am satisfied, he meant it to take effect; and therefore I will make it take effect. Is any case mentioned in *Ward v. Turner* of delivery, not of the thing actually, but of the key of a cabinet, containing jewels?

1793.
TATE
v.
HILBERT.

[*116]

[For the defendant, *Jones v. Selby*, Prec. Ch. 800, was cited.]

Reply :

[117]

All the cases, in which it has been determined, that promissory notes or bills of exchange, voluntarily given, could not be supported at law, were cases, in which evidence might be given, that there was no consideration, and where the circumstances were such, that it appeared not to be the intention of the party to make a gift: but where there is that intention, it is not determined, that an action cannot be maintained. Upon a voluntary bond it may unquestionably. The instrument may be declared upon as importing a *primâ facie* consideration. Here the instrument must be avoided; and, if the person making it intends it

1793.

TATE

v.

HILBERT.

as a gift, a question may arise, whether it can be avoided. The case mentioned turned upon there being no such intention.

LORD CHANCELLOR :

I cannot possibly give it any different effect from that, it would have at law. I will retain the bill, if you mean to bring an action.

The *Solicitor-General* desiring time to consider, both bills were ordered to stand until the term.

April 22.

These causes stood for judgment; and the LORD CHANCELLOR, having stated the case, delivered his opinion :

[*118]

By the first of these bills it is supposed, that this cheque is totally ineffectual without the aid of this Court. I have given the case much attention from a settled persuasion, that upon the part of the plaintiffs it is a proceeding perfectly fair and honest : but, though that is the colour of the facts in the present instance, yet these cases are liable to the observations, which have been *made, that to make a stretch to effect gifts, made to persons surrounded by relations, who give evidence for each other, would be attended with great inconvenience. There is no doubt, that in this case the transaction is fair. If it fails, it is a case of mistake upon the part of the person, meaning to give, and also of mistake, or delicacy, upon the part of the person, to whom the gift was made ; as if she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good ; or even if she had received it immediately after the death of the testator, before the banker was apprised of it, I am inclined to think, no Court would have taken it from her. But with all the disposition I feel to make it effectual I must resist that impulse ; as nothing is so dangerous as to decide upon circumstances of favour to particular parties ; and, unless I can find some solid ground to support it, so that there will be no danger from the precedent, I cannot decree for the plaintiff.

The claim of the plaintiff Mary is supported upon the ground, that the delivery must be *donatio mortis causâ* ; and is within the description given by Swinburne ; and operated as an appoint-

ment of so much money in the banker's hands in favour of the person put in possession of the note, payable to bearer; and in support of this *Lawson v. Lawson* was cited and commented on. Upon the other hand it was contended, that this was a banker's cheque, a common cash note; and that it would be a strain and confusion of terms to constitute it an appointment; that it is simply a gift; that they cannot claim as a legacy, nor as a debt; and therefore that this Court will not give it more effect than it would have at law. I have looked into the cases; of which there have been several upon this question. The reasoning is generally taken from the Civil Law, and with great propriety; as the jurisdiction, in which these cases may as well occur as here, is the Ecclesiastical Court, which has properly followed the reasoning of the Roman law. All the passages in Swinburne are only references to different texts of the Civil Law; and where he defines *donatio mortis causâ*, he is coupling the description of a legacy with a very short text of the Civil Law; and there is a perplexity in it. He takes it from a part of the Civil Law compiled at a time, when the subject itself rested in a degree of contradiction, and it was the common topic of debate, whether gifts under such circumstances *resembled a gift or a legacy. There are three species, of which he takes notice; first where a person, not terrified by fear of any present peril, but moved by the general consideration of man's mortality, makes a gift: the second is, where a person, being moved by imminent danger, gives so, that the subject is immediately made his, to whom it is given: the third is, where a person, being in peril of death, gives something, but not so, that it shall presently be his, that received it, but in case the giver dies. The two first are clearly mere donations. Swinburne has there taken an authority from the Digest, which he refers to, and has copied. It does state these donations; and rates them all under the general title *Donatio mortis causâ*. That is the time, when it was in dispute. "Julianus libro 17 Digestorum tres esse species mortis causâ donationum ait; una, cum quis nullo præsentis periculi metu conterritus, sed solâ cogitatione mortalitatis, donat. Aliam esse speciem mortis causâ donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis.

1793.
TATE
v.
HILBERT.

[*119]

1793.

TATE

v.

HILBERT.

Tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta." If he had looked a little farther under the same title, he would have found there an opposite, but a much more correct, opinion; which finally prevailed, and was established as legal. It is the 27th law. "Ubi ita donatur mortis causâ, ut nullo casu revocetur, mors" (that must be supplied) "causa donandi magis est, quam mortis causâ donatio: et ideo perinde haberi debet atque alia quævis inter vivos donatio: ideoque inter viros et uxores non valet; et ideo nec Falcidia locum habet quasi in mortis causâ donatione." In the institutions in the time of Justinian, Tit. 7, *De Donationibus*, there is a history given of these contests, that had prevailed: and a definition is strictly given of what shall be *Donatio mortis causâ*. "Mortis causâ donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitûs ei contigisset, haberet is, qui accepit; sin autem supervixisset is, qui donavit, reciperet: vel si eum donationis pœnituisset; aut prior decesserit is, cui donatum sit. Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia; nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumeretur; et sic procedat, quemadmodum *nostra constitutio eam formavit: et in summâ mortis causâ donatio est, cum magis se quis velit habere, quàm eum, cui donat, magisque eum, cui donat, quàm hæredem suum."

[*120]

There it is clearly and correctly defined, that it had in effect the nature of a legacy; was liable to debts; and that it was only a gift upon survivorship; and the danger of suffering these gifts to be taken loosely occasioned at the same time with the passage, I have read, an ordinance by the Emperor, that it should be in writing with five witnesses. In the case before Lord HARDWICKE, in which all the cases were very fully considered, he takes notice of this perplexity in the reasoning, before it was properly defined; but considers clearly, that by the law of England it cannot be a present, absolute, gift, but to take effect on the death of the party; and, following the line there

and supporting his own authority, he considers delivery essential. It is not necessary in this case to discuss, whether delivery is necessary in all cases. Perhaps it might not be difficult to conceive, that it might be by deed or by writing. It is clear, it could not be by mere parol; as saying, "I give," without an act, does not transfer the property. So far I concur with the reasoning in that case. It might be considered, if the case should arise, whether there would be any objection to a formal deed. I should think it not within the jurisdiction of the Ecclesiastical Court: and that the property so given is not to be possessed by the executor. It is bad against creditors; and therefore within the reach of creditors; but does not regularly fall within an administration; or require any act by the executor to constitute a title in the donee. It was observed for the defendant, that the case of *Lawson v. Lawson* was overturned by Lord HARDWICKE. I have caused the Registrar's book to be searched; and the report in P. Williams is certainly inaccurate: but the decision is perfectly right. The only doubt remaining with regard to the case was, whether it was not necessary in point of form to have authority from the Ecclesiastical Court: but I think the MASTER OF THE ROLLS was right in not requiring probate. As it stands in the book, you take it only as matter of fact and evidence, that the money, for which the bill was given, was to be applied in mourning: but by the Registrar's book that was actually indorsed upon the bill. According to that in fear of a sudden change he did give to the defendant 100*l*. That was an immediate gift. It proceeds to *say, that he drew a bill upon the defendant Middleton payable ten days after sight; and by a note in the bill of his own handwriting declared it to be for this defendant for mourning; and refers to the said note in writing in her custody. There were also contained in it directions concerning the childrens' mourning. The only question, that could arise there, had the argument taken a larger scope, than it did, was, whether this note should be proved. In the report you do not see the *ratio decidendi*. In one part the MASTER OF THE ROLLS states it as an appointment; in another he lays stress on its being for mourning: but it was not necessary to prove it; as, taking the whole bill together, it is

1793.
TATE
v.
HILBERT.

[*121]

1793.

TATE

v.

HILBERT.

an appointment of the money in the banker's hands to the extent of 100*l.* for the particular purpose expressed in a written appointment; which is a purpose, that necessarily supposes his death. Therefore that case is perfectly well decided. But upon that decision I cannot say, that in all events drawing a cash note upon a banker is an appointment of the money in his hands. Suppose, I was to apply that idea of an appointment, this is to take effect presently; and has no relation to his death. The plaintiff might have received it immediately. There is no reference at all to the case of her surviving him. It was not appointed under such circumstances, that it could not take effect but in case of his death: but it is stronger in this particular case; as by the evidence it was given, and fairly given. At the time he made this gift the act he was about to do was not legatory, to bequeath; on the contrary from the conversation, that took place, and the act, he was about to do, having considered what he had done by his will he meant to give more; and in doing so to make effectual gifts. Under that idea he cancelled those securities; not meaning them to be unavailable only in case of his death. In the same way he meant what he did for these plaintiffs as immediate gifts. Therefore I can make no more of this. I do not like to take it up upon favour to the parties, or to speculate upon it as an appointment. Being a gift it cannot be sued for as a legacy. I cannot make it better. If the law will not allow her to recover against the executor any more than against the banker, I lament it: but I cannot give it more effect than it can have at law. I do not know, whether it has been considered as to the possibility of bringing an action against the executor. If the promissory note can be made good at law, one should feel no *reluctance to make it good: but they must stand, as they are at law; and this Court cannot give the parties any relief. If there is anything intended to be done at law, I should have no difficulty to retain the bill; as if any accounts were to be had as to assets.

[*122]

It was admitted, that the assets were abundant.

The *Attorney-General*, for the plaintiffs, said, that as to the

promissory note they had opinions of common lawyers in favour of an action. He therefore desired time to consider upon it.

1793.

TATE
v.
HILBERT.

The LORD CHANCELLOR asked, whether any hope was entertained, that they could recover at law upon the draft on the banker?

The *Attorney-General* said, he did not know of any.

The first bill was then dismissed: but, upon the application of the *Attorney-General*, without prejudice to any action at law; in order that it might not be considered as an authority against such action.

WALKER v. DENNE.*

(2 Vesey Jr. 170—187.)

1793.

May 1.
June 10, 11, 12.

LOUGH-
BOROUGH,
L.C.
[170]

Testator directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations applicable to real estate: the money not having been laid out, the Crown on failure of heirs has no equity against next of kin to have it laid out in real estate, in order to claim by escheat: the devisees on becoming absolutely entitled have the option given by the will; and a deed of appointment by one, a *feme covert* was held sufficient indication of her intention, that it should continue personal property, against her heir, claiming it as ineffectually disposed of for want of her examination.

Trustee, not having the legal estate, cannot hold against the Crown, claiming by escheat.

Copyhold cannot escheat to the Crown.

The rule, that money, directed to be laid out in land, shall be considered as land, holds only, where the quality of land is imperatively fixed on the money.

JOHN CLARKE by his will directed, that within three months after his death a suit should be instituted in the Court of Chancery for the purpose of carrying the trusts into execution. He subjected his real estate to his debts; and gave to his executors annuities of 90*l.* so long, as they should continue to act, and annuities to Anne Simpson, Mary Simpson, and another, to continue only during the life of his son, and also gave some legacies.

* *Sharp v. St. Sauveur* (1871) L. R. 7 Ch. 343; 41 L. J. Ch. 576..

1793.

WALKER

v.

DENNE.

He then gave all the rest and residue of his freehold, leasehold, and copyhold, estate to his son, his heirs, executors, administrators, and assigns, as soon as he should attain twenty-one; the rents and profits to be applied during his minority to his use and benefit, as after mentioned. He then stated the property he possessed in South Sea stock and annuities; and directed, that, as often as they were paid off, the money should be laid out in the same stock, and that the produce of his estate during the minority of his son should be laid out from time to time in the same stock, for the benefit of his son; that there should be no sale or transfer, until his son should attain twenty-one; that then the whole should be transferred to him; but in case his son should die under twenty-one without leaving any issue he directed, that all the said stock and annuities should be sold; and that the money together with all other produce of his estate remaining after discharging the expense of his son's maintenance and education, and all other charges aforesaid, and the expense of his funeral, should be laid out and invested in the purchase of any manors, lands, tenements, tithes, and hereditaments, or very long terms for years, in Great Britain, in the names of his executors, the rents, issues and profits, thereof with those of his freehold, leasehold, and copyhold, estates to be applied thus; one moiety to his niece Anne Simpson, for life, for her separate use, and after her decease the like payment to be made to her daughter Mary Simpson, for life, for her separate use; and after the decease of the survivor the said moiety to go to and among all and every the child and children of Mary, living at her death, as tenants in common and not as joint-tenants, and their heirs; if but one, to that one; and, if there should be no child or heir of her body issuing living at her death, then to revert to his own right heirs. As to the other moiety, to his other niece Frances Clarke in the *same manner, and with the same limitations to her children: but there was no such limitation of the reversion for default of children or heirs of her body to his right heirs, as was contained in the disposition of the other moiety.

[*171]

The son died soon after the testator, under the age of twenty-one, and without issue. Anne Simpson died in 1764. Mary Simpson married King; and died without issue in 1768. Frances

Clarke died in 1788, leaving two children, Frances Searle and Elizabeth Middleton Abbott. The executors did not make any purchase according to the directions of the will ; but applied the dividends and profits in moieties to the tenants for life. This bill was brought for the purpose of carrying the trusts of the will into execution, and for an account and distribution of the testator's estate. By the report it appeared, that besides what the testator had enumerated in the will there were other personal property, outstanding debts, and a mortgage. The Master reported, that after the death of Mary King one moiety of the freehold and copyhold estate, of which the testator was seised, escheated to the Crown for want of an inheritable heir of the whole blood of the testator.

Upon farther directions one question was, whether one moiety of the personal property, directed by the will to be laid out in lands of inheritance or long terms for years, was to be considered as real estate, belonging to the Crown as an escheat for want of an heir from the death of Mary King, or, according to the real fact, as personal estate, to be distributed in moieties to King and Walker in right of their wives, who were the representatives of Anne Simpson and Frances Clarke, the next of kin of the testator and his son. Another question arose upon the claim of the trustees ; who insisted, that, supposing it was to be considered as real estate, they were beneficially entitled ; as there was no person, who could call for execution of the trust. A third question, suggested by the LORD CHANCELLOR during the argument, was, whether Mary King by the terms of the limitation over in default of children or heirs of her body would not, if it had been real estate, have taken an estate tail ; and therefore, if it was personal, whether she did not take it absolutely ; in which case the whole of that moiety would go to her husband.*

As to the moiety devised to Frances Clarke and her children, one moiety of that passed by the will of her daughter Frances Searle ; and there was no dispute about it. As to the other moiety of that moiety, the freehold under a fine levied by Mr.

1793.
WALKER
v.
DENNE.

[172]

* This suggestion, raising a question between the two co-plaintiffs, created an objection of form : but, the parties being of age, that objection was waived. This question was not determined.

1793.
WALKER
v.
DENNE.

and Mrs. Abbott and a settlement became upon her death without children absolutely vested in her husband. He also claimed under the settlement and a deed of appointment, executed by his wife a few months after the death of her mother, a moiety of a moiety of the fund, directed by the testator to be laid out in land. That claim was resisted by the heir-at-law of Mrs. Abbott on the ground, that, being money directed to be laid out in land, it could not pass by the deed of appointment for want of the separate examination of the wife. The leasehold and copyhold estates, which came to Mrs Abbott, were not affected by the fine or appointment. The former was claimed by her husband as administrator.

Mr. Lloyd and Mr. Simeon, for the plaintiff Walker :

The fund, which was to have been laid out in land, being originally personal property, and never having been so laid out, the Court will not now lay it out for the purpose of giving it either as an escheat to the Crown, or to the trustees ; whose claim is founded on the doctrine of *Burgess v. Wheate*, 1 Black. 123, as being in possession of the legal estate ; and no person, who can call for execution of the trust, being in existence. It is impossible to know from the testator's will his principal intention, whether the fund should be laid out in freehold estates of inheritance or long terms for years ; and, if the Court cannot say decisively, that freehold was intended in preference to leasehold, it will not now be laid out in the former. *Curling v. May*, before Lord Talbot, which appears by comparison with the Registrar's book to be rightly stated in 3 Atk. 255, is not to be distinguished from this. That was a strong case ; but not so strong as this ; as there it might have been said, that the heir of the wife was as much an object of the bounty of the testator as her administrator : but the immediate object of the trust being dead, the Court thought, the parties had no equity ; but must take it, as they found it.

LORD CHANCELLOR :

Supposing it personal property, why is not the whole claimed by King ? Upon the words of the will there is great ground to

contend, *that Mary King would, if it was freehold estate, have taken an estate tail. The particular limitation is only to the children : but he goes on to mention the heirs of her body. He clearly meant, that a grand-child should take ; and a grand-child could not take without supposing her to have an estate tail. Then, if it is to be considered as money, she must have taken it absolutely.

1793.
WALKER
v.
DENNE.
[*173]

For the plaintiff Walker :

Beyond the tenants for life the testator intended no particular favour to anyone ; but that it should go, as the law would dispose of it. The Court will remain in a state of neutrality, unless there is some equity to call it into action. This Court will not interfere, after the purposes, for which the testator intended to convert the property, are at an end. * * *

Mr. Mansfield, Mr. Selwyn, and Mr. Fonblanque, for the plaintiff King :

This must remain personalty ; no purpose now existing, for which it ought to be changed. The trustees would exercise their power of election in a very extraordinary manner by choosing to lay it out so as to give it either to the Crown or to themselves. The money and the terms to be purchased with it would go the same way ; therefore there is no reason now, why it should be laid out in either species of property. * * *

Attorney-General, Solicitor-General, and Mr. Campbell, for the Crown : [175]

This purpose is capable of being effected, if it could have been effected at the death of the testator ; and the true question is, whether immediately after his death the Court must not upon application have limited the remainder to the right heir of the testator ; and whether the heirs of that heir failing, the Crown is not entitled. * * *

Mr. Grant, and Mr. Hollist, for the trustees :

Upon the supposition, that this is real property, there is an end [179]

1793.
WALKER,
v.
DENNE.

of any equity to call on the executors to execute their trust; although, if it is to be considered as personal, their annuities will make them trustees. From the direction to purchase in the name of the executors, if a purchase had been made, the legal estate would have been in them, and the conveyance must have been to them, and their heirs. * * *

[180]

Mr. Cox, for the heir-at-law of *Mrs. Abbott* :

As to *Mrs. Abbott's* moiety of *Mrs. Clarke's* moiety of the money directed to be laid out in land or long terms, it is to be considered as land; and then it was not competent to a *fême covert* to pass it by deed without examination in Court analogous to a fine. * * *

Mr. Graham, for *Mr. Abbott*. * * *

[182]

Reply :

There is no legal estate vested in the trustees; and their claim can only be founded on their having a legal estate. The whole property was to be absolute in the son at twenty-one. No estate tail by implication could arise to *Mary King*; who by the will has a clear interest for her life; and afterwards a fee is given to her children with an executory devise over. It is only a fee with a double aspect; to her children, if any; if not, to go over. The words "to revert to my own right heirs" do not shew an intention, that at all events it was to be laid out in land. They are only words of course. He had the same intention as to both moieties; and there is no doubt, if *Mrs. Clarke* had died without children, her moiety, being personal, must have gone to the next of kin. In *Goodright v. Dunham*, Doug. 251, a case like this and almost in the same words, it was held, that there was no estate tail by implication.

[NOTE.—The cases cited by counsel did not in his Lordship's opinion apply under the peculiar circumstances of the will and they are consequently omitted from this report.]

THE LORD CHANCELLOR stated the case, and delivered his opinion :

It was contended as to one moiety of the stock in the possession of the testator, and what has accrued, that by the direction to the trustees it is become real estate ; and, there being no issue of Mary King, who would be entitled to the capital of it, that the Crown is entitled ; as, there being no representative in the inheritable line of the testator, or his son, or Mary King, she having no heir of the blood of Clarke, it has escheated. On the other hand it was contended, that, as in fact it is personal property, and there is no absolute trust, fixing imperatively upon it the quality of land, but it might still have been invested in land so as to continue personal, and as there is no person who can under any possible intention claim execution of the trust, it must remain personal. The argument, pressed to have if considered as real estate, takes the scope of those cases, which go upon the rule, that what is directed to be done ought to be done, and that, which ought to be done, is considered as done ; that the directions in the will turned the money into land ; and it must in all subsequent proceedings be so considered, even to the extent of an escheat. I abstain from the discussion at large of the doctrine, that has been traced through a great many cases, and is liable, I think, still to a farther investigation, and to be more exactly defined. Whether this Court will on behalf of the real representative, claiming merely as a representative, and against the personal representative, exercise what is called, I know not why, the favour of the Court towards the real representative, and exercise that between them, both volunteers, in order to *give a sum of money a quality, it has not, I need not now decide. I feel a difficulty in doing it, surrounded as I am by authorities, which, if they were pressed to the utmost extent, would compel that construction and even carry it to the case of the Crown. But I believe, in every case of that kind, all of which are very accurately and fully collected in Mr. Hargrave's argument in *Pulteney v. Lord Darlington*,† it is a necessary circumstance, that, where it is by will, the will, and where by

1793.
WALKER
v.
DENNE.
JUNE 12.
[183]

[*184]

† 1 Br. Ch. C. 223.

1793.

WALKER
v.
DENNE.

contract, the deed, must decisively and definitely fix upon the money the quality of land. That is not the present case; the testator having left it perfectly at large, whether in the conversion of the property it should be converted into inheritable property, or that species of landed property, that would be distributable as personal. I do not perceive, that it is to be argued, though very ably attempted by the Attorney and Solicitor-General for the Crown, that the direction to the executors is merely leaving an opening to them to make a purchase of some leasehold interest, that might be convenient to the occupation of the land; but that the general purpose was to turn it into land, in order to make it descendible; as for that I must collect, that the uses, to which he intended to apply the purchase, are uses, that could only be executed in consequence of its being descendible estate, that was to be purchased. But the testator's object regarded principally a provision for his son. His look-out did not go very far; as in a few years the son would have been absolute master. The will is careless after that: but evidently beyond the first takers for life the very next person to take would have had the absolute estate. There was no remainder, or limitation in strict settlement. The children of Mary King at the death of the tenant for life would have become absolutely entitled. Therefore a long term would have done just as well. It would be too much to state, that it should be merely in the option of the trustees: but certainly the persons entitled beneficially, when they became entitled, had a right to say to the trustees, "buy leasehold" or "buy freehold;" as there was no person beyond them, who could control their absolute decision upon it. This brings the case to that, quoted in *Guidot v. Guidot*, which, it is said, has been examined in the Registrar's book; and is correct in Atkyns. The distinction therefore in the present case is, that that essential circumstance, upon which all the decisions must be bottomed, namely, that the quality of real estate is imperatively and definitively fixed upon it by the instrument, fails in this; and it remains *ad arbitrium*, whether it is to be considered as land or money. Then is there any reason to raise an equity to convert the money into a different species of property in order to create a different effect? There is no person, claiming under

the will of the testator, appearing, to insist, that it shall be considered as that, which *de facto* it is not. The Crown comes under no head of equity. I think it would be a great stretch, even if that circumstance of the option was wanting; but with that circumstance to convert it for the Crown is too extraordinary for a court of equity. It is my opinion therefore, that the case is unaffected by that general train of authorities upon the peculiar circumstances of the will; and that I am at liberty to consider one moiety to be that, which in truth it is.

As to the other moiety I am not in the least embarrassed; as by the conduct, which the parties have held, I am not called upon to convert it into land; as it answers every purpose as well or rather better to continue it personal property. As to the estates he actually possessed, the freehold he has not devised to his trustees undoubtedly. I cannot find, that any estate is given to them in any part of the will. If they were to execute this trust, they must, if they had purchased land, have declared it to uses as a legal estate: but as to the land he actually possessed there is no devise to them at all. The only legal interest in them would have been to receive the rents and profits during the minority of the son, and to apply them to the married women during their lives. The consequence of there being no devise to the trustees is, that one moiety of the freehold will go to the branch claiming under Mrs. Clarke; the other being transmitted to the son, and there being no heir, one moiety of the freehold does undoubtedly escheat. As to the leasehold, it is no part of that fund, which was to be sold and laid out in the purchase of land; nor is the general personal estate according to the construction I take of the will, to be so laid out. The words are confined to the stock he was actually possessed of, and the produce of his estate to be received by his executors; which is clearly annual produce; as it is produce after discharging maintenance and other annual charges. The thing to be laid out, upon which the trust attaches, is only that fund and that produce. How much there would be at his death is uncertain. Besides that he had other personal property and *leasehold estate, which he has never again taken up, except as coupled with the freehold; but there is no direction, that either

1793.
WALKER
v.
DENNE.

[*186]

1793.
WALKER
v.
DENNE.

the leasehold or the general residue of the personal estate shall by the executors be converted into land. One moiety of the leasehold therefore goes to those claiming under Mrs. Clarke, viz. in moieties between Frances Searle and Elizabeth Abbott; whose husband must have her share, as administrator: the other falls into the residue of personal property; and becomes distributable, as the general residue is. There seems to be other estates. Upon the report there appears to be outstanding debts, and not desperate debts; among others a mortgage; therefore there is a residue, the distribution of which must make part of the consideration of the Court. The personal estate then falling into the residue, the disposition of that residue must be to distribute it as the personal estate of the testator, vesting in point of right first in the son, sole next of kin of the testator, upon his death in Anne Simpson and Frances Clarke, who were at his decease his next of kin; and from these two the representation is deduced as to Anne Simpson's moiety through her daughter Mary to King, her husband; the representation of the other part is carried on from Frances Clarke to the wife of Walker, her executrix. As to the 5,200*l.* South Sea stock, and 6,100*l.* South Sea annuities, standing in the name of the testator at his death, with 200*l.* like annuities, the first and, I believe, the only purchase, made in the life of the son, and which is admitted to be the whole amount of the clear produce during the life of the son after the deductions for his maintenance, &c. these sums are the subject of the will, directed to be invested in some purchase. No purchase was made: but the dividends were applied properly enough by the trustees in moieties according to the directions of the will as to the rents and profits of the estates to be purchased. The capital now remains to be disposed of; one moiety belongs to Frances Searle and Elizabeth Abbott, daughters of Frances Clarke; the other falls back into the general residue of the personal estate; and will follow the disposition of the residue. Frances Searle has disposed of her share by her will. As to the share of Mrs. Abbott, it is contended that that belongs to her heir at law. He takes the same general line of argument as the Crown, that it is to be considered as land, and for the heir at law: if so, her deed of appointment

cannot pass it, and it is to be considered as ineffectually disposed of for want of her examination. I need *not enter into that question as to her appointment without examination; as it is clear, she had a right to consider it as personal property on account of the option; and the deed of appointment being quite sufficient to dispose of it, if it was leasehold, and equally sufficient to dispose of it *in transitu* in its progress towards leasehold, her heir is therefore barred by that deed, and can take only what he is entitled to under it. That share therefore must go according to the trusts of the deed of appointment. Then there is a large sum, between 8 and 9,000*l.* South Sea annuities. The greater part consists of accruing dividends, laid out from time to time upon that, which was to have been the portion of the Simpsons. That will follow the same rule as to the moiety itself, and will go between King and Walker. There must be a farther inquiry as to the copyhold. I do not know, who was admitted since the death of the testator, or who is now the tenant. If there is no surrender, I can decree nothing about it. The Master has reported, that one moiety of the copyhold escheated; but that must be a mistake; as the copyhold cannot escheat to the Crown. A moiety of a moiety must of necessity belong to the heir of Mrs. Abbott; neither the fine nor the appointment touching it.

1793.
WALKER
c.
DENNE.
[*187]

SANDFORD *v.* REMINGTON.

(2 Vesey Jr. 189.)

Attorney examined as a witness must disclose acts done in his presence by his client, as execution of a deed, &c.; not private confidential conversation with him, as the reasons for making it, &c. On motion to suppress the depositions of an attorney alleged to contain confidential communications an inquiry was directed with a view to the suppression of such matter.

1793.
June 19.
LOUGH-
BOROUGH,
L.C.
[189]

THE *Attorney-General* moved to suppress depositions on the ground that the witness was confidential attorney and solicitor of one of the parties. He said, the Court will on motion suppress depositions, if improper; as a Court of Law would prevent

1793.
SANDFORD
v.
REMINGTON.

improper evidence from going to the jury, if tendered at the trial.

On the other side it was said, depositions are never suppressed; though interrogatories are.

LORD CHANCELLOR :

I see no possible way to come at it but by referring it to the Master to see, how much was matter of that sort, that from the confidence between attorney and client ought not to be disclosed. It is not adequate to the case to let it stand, trusting to never letting it have effect. It is very difficult at law to argue that the evidence should not have been given; and therefore it should have no effect. The Judge may strike the evidence out of his notes: but it has its effect. The Court takes upon itself to stop a witness; and does not require the objection to be taken. This witness may be called on to disclose all, that did pass in his presence at the execution of the deed, as a witness; so his having been sent by his client with orders to put the judgment in execution: that is an act: but he is not to disclose the private conversation as to the deed with regard to what was communicated as to the reasons for making it, &c. I have seen much evidence lately, that ought not to have encumbered the records. This man concludes with his conception of what might have passed elsewhere from the countenance of the person at the time of execution. It is a pity, that should ever have been inserted. Refer it to the Master to inquire, which of the matters in the depositions came to the knowledge of the witness as confidential attorney and solicitor. The Register says, depositions are often suppressed upon motion for impertinence and scurrility.

BALL v. MONTGOMERY.

(2 Vesey Jr. 191—199.)

Settlement on marriage of stock belonging to the wife in trust after death of the wife, if the husband survived, for him for life, if no issue, the whole to revest in the wife with power of appointment, if none, to her next of kin; the wife eloped and lived in adultery; on the bill of the husband to have the dividends paid to him during their joint lives, evidence of such intent, or that they should be to the separate use of the wife, refused: but held to belong to the husband for the mutual support of both; decreed, that the costs and also the expenses of the husband in a groundless suit instituted against him by the wife in the Ecclesiastical Court should be paid out of the accumulation, and, the only surviving trustee appearing not to be indifferent, that the future dividends should be paid into Court.

Costs refused to a trustee, setting up a trust different from what it really was: but general misconduct, &c., is not a sufficient ground.

PREVIOUSLY to the marriage of Mr. and Mrs. Ball 5,000*l.* stock, to the interest and dividends of which she was under the will of her uncle entitled, until she should attain the age of 21, when the principal was to be absolutely transferred to her, was with the concurrence of the husband vested in her mother Mrs. Aynsworth and in Montgomery, upon trust, that the husband should receive the interest and dividends after the death of the wife, in case he should survive her, for his life, and in the event of there being no issue that the whole should revest in her in the same manner as if she had continued sole, with power of appointment of the whole or part to such persons, and in such manner, as she should think fit; in default of appointment to go to her next of kin according to the statute of distributions. By this settlement there was no disposition of the interest and dividends during the joint lives of the husband and wife. In May, 1785, she came of age; and in June following made an appointment, giving the whole fund to her husband, in case there should be no issue. In 1788 she eloped from her husband; and immediately after instituted a suit in the Ecclesiastical Court against him for a divorce on account of impotence. That suit was determined in favour of the husband; who was dismissed from the charge: but by the course of the Court he was obliged to pay all the costs. After the separation she lived,

1793.

July 1.

LOUGH-
BOROUGH,
L.C.

[191]

1793.
BALL
 v.
 MONTGO-
 MERY.

[*192]

and at the hearing of this cause continued to live, in a state of adultery. The bill was brought by the husband against his wife and the trustees, claiming the dividends during their joint lives, and to have the fund secured on account of his contingent interest. They went into evidence on both sides as to the intention at the time of making the settlement ; all parties contending, that it was contrary to the intention, and ought to be varied. The plaintiff insisted, that it was a mere omission in not giving him the dividends expressly for the lives of himself and his wife : the wife and her mother contended, that the omission lay in not creating a trust as to those dividends for the separate use of the wife. Upon this point the LORD CHANCELLOR said, early in the cause, that he must take the settlement, as it was ; and could not alter it by parol ; and therefore should pay *no attention to the evidence produced for that purpose on either side.

When the cause was heard, Montgomery, one of the trustees, was dead. The questions were, first, whether the plaintiff was entitled to these dividends during the joint lives of himself and his wife ; or whether she could claim them, as a resulting trust to her separate use ; secondly, if the plaintiff was entitled, whether he could take the dividends without making a provision out of them for the wife : a third question was made at the bar, though not prayed by the bill, whether, if the plaintiff could not succeed, the dividends should not be brought into Court.

There was contradictory evidence as to the plaintiff's usage of his wife. On her part it was insisted, that his ill treatment was the cause of her leaving him : for him, that was said to have been occasioned by the persuasions of her mother. There was also evidence of fraud by the husband in procuring her appointment by his making a will at the time in her favour.

Attorney-General and Solicitor-General for the plaintiff :

If the husband cannot succeed upon evidence of the intention, yet in law he is entitled to these dividends. Under the appointment he has an interest, which entitles him to call to have the fund secured. This Court has no jurisdiction to try the ground of separation between husband and wife. There have been cases, in which the Court has refused to give the property of the

wife to the husband without provision being made for her : but, if he chooses to go without the property himself, the Court cannot give her own property to her ; *Alexander v. M'Culloch*, before Lord Thurlow : there the husband used the wife very ill ; yet the CHANCELLOR every year for six successive years decided, that she could not have any part of her property unless the husband would consent. At all events he has a right to have the dividends brought into Court. As the settlement stands, it is to be inferred, that these dividends were intended to go to the husband. If there had been any conception of a provision for the separate use of the wife, it would not have been omitted. There is nothing in it to imply a right of that sort. The material right of the husband ought to attach ; and, considering the wife's conduct, that equity, to *which but for that she would be entitled, ought not to attach. She lives in open adultery ; and therefore can claim no maintenance. She cannot set up any demand against this property, except to have a provision for her separate use. She certainly can have no claim as far as the extent of the expense, to which she has put her husband by that suit in the Ecclesiastical Court. The settlement is very favourable to her. If there is no issue, she is to have the disposition of it ; and if she makes none, it goes to her next of kin ; and excludes her husband. The ground for her separate provision therefore must be, that notwithstanding his material right her situation is such, that, being separated from him, she ought in equity to have a separate provision. The facts are, that she separated from her husband under circumstances of loose living with one man ; and now lives with another ; and that she puts her husband to great expense by that groundless suit.

1793.
BALL
v.
MONTGO-
MERY.

[*193]

Mr. Mansfield, Mr. Grant, and Mr. Hart, for the defendants :

As to all the trusts not declared by the settlement, being the property of the wife it resulted to her, and to her separate use. There is no case, in which a husband has been determined to have any claim to property of the wife, which he permitted to be conveyed by her to trustees previously to the marriage. There

1793.
 BALL
 v.
 MONTGO-
 MERY.
 [196]

is a certain trust declared in favour of the husband ; therefore it is evident, no greater interest was intended for him. * * *

LORD CHANCELLOR :

I cannot go all the length, the Counsel for the plaintiff desire. I will state, how far I can go, and leave it to them to try to induce me to go farther. First, I must entertain this bill. It is necessary, that this fund should be transferred to the Accountant General. There is only one trustee now living, and not an indifferent trustee. The eventual right of the husband I am not now to decide : but I must take care, that it shall not be defeated by a breach of trust. This settlement has no omission, unless it is true, which I cannot take to be so, that these dividends were to be secured to her separate use. Both parties say, there is an omission. It is not so advantageous to either, as they would have it : but it is complete. There was no occasion to say, whether these dividends should go to the husband during coverture ; as they would do so by law. It was necessary to provide as to the future disposition after her death. The settlement therefore is clear. The fund is secured by the settlement for the children ; and during the coverture the dividends are payable to the husband in right of the wife by this Court acting upon the trustee. Upon the facts I cannot enter into their conduct, while living together, farther than what is apparent. She deserts her husband's house. She was not deserted or turned out of doors : but she eloped without his consent ; and instituted a very groundless and infamous suit against him in the Commons. There was a separation between them during all that time ; and since and now she lives in adultery. The direction, that I am inclined to give, is this ; first the costs must come out of the dividends accumulated ; next I would repay to the husband all the costs, he has paid in *the Ecclesiastical Court ; and so I am inclined to think, I should, even if it had been separate property of the wife, if I had control over the fund : but as to the future dividends, here are a husband and wife *de facto* separated. The ground of making the husband, if he wants the whole, make a provision for the wife is plain ; that this fund of her fortune is to be a mutual provision for them

[*197]

living together; therefore if I give the whole to one, when separated, I defeat the mutual interest, both had in it. If I could order any specific part to the wife, as to which I doubt my power, I could not in this instance do it; as it would be enormous to give it to enable her to keep the gallant, instead of his keeping her: but then I would not give it to the husband; but am inclined to do, as Lord THURLOW did in *Alexander v. M'Culloch*, after those applications I have mentioned, to have the dividends paid into Court. I cannot give the whole to the husband; nor with any degree of decency or good sense can I give it to the wife.

1793.
BALL
v.
MONTGO-
MERY.

Reply:

As to paying in the future dividends, there is no case, where the husband was entitled to the dividends under a contract made on marriage, in which the Court has ever interposed to stop his right under that to receive the dividends on account of any circumstances, which obtained between him and his wife. * * *

LORD CHANCELLOR:

[198]

If there had been an express gift to the husband in the terms of the contract, I should adopt your reasoning: but I cannot take it as an express gift to the husband; or distinguish this case from that of a sum of money, belonging to the wife, not specifically given to the husband. That is trust money in the hands of the Court; and he cannot get it otherwise than by coming *here. He cannot bring an action against the trustee but for money had and received. The trustees could not be sued at law, unless she had the dividends in her pocket. There is no way of coming at it but by application to this Court to act against the trustee. Then, whatever is the delinquency of the wife, can I let the husband have it? You argue, as if I was going to decree it to her; which I certainly shall not. Her delinquency is a good ground for not paying it to her, but is not a ground for me to let him receive the whole of this property; which, being hers originally, was intended to be his partly to support her. I cannot let her have it, nor the husband; as then she would be left unprovided for. See the consequence of

[*199]

1793.
BALL
c.
MONTGO-
MERY.

it: from her past and still subsisting misconduct, I must continue her in a state of adultery, or reduce her to beggary. I cannot suppose, he is to take her back. *Alexander v. M'Culloch* is, as far as I have heard it, a very good rule to go by. The situation of the case will probably produce some agreement for her future support. I would not refuse the mother her costs, because she was a bad woman, or for reasons of that kind: but, I think, there is a ground to refuse them to her from her setting up a trust different from what it really is. All the other parties must have their costs, and the husband must have all the costs, he has paid, or is bound to pay, in the Ecclesiastical Court, out of the accumulated dividends; and future dividends must be paid into Court subject to farther order.

1793.
July 8.
LOUGH-
BOROUGH,
L.C.
[238]

BLANDFORD v. THACKERELL.*

(2 Vesey Jr. 238—242.)

Testator gave real and personal estate in trust that a commodious and proper house should be taken on lease at such yearly rent, as should be agreed on, or otherwise, as the trustees should think fit, as a school; and that the children and grand-children of some relations should be placed there from the age of seven to fourteen, then to be put out apprentices; also that such other children, as the trustees should think fit, should be placed at the same school; and he gave directions as to an inscription, visitation, &c.: this trust is void under the mortmain act as to the general purpose of a permanent charity, but good as to the disposition for the relations to the extent of children and grand-children of such of the stocks specified as were in being at the testator's death; and, while the school is kept open for them, other children may be educated there.

TESTATOR gave all his real and personal estate to trustees, with directions, that as soon as conveniently might be after his decease a commodious and proper house should be taken by them in Bridgewater upon lease, at such yearly rent as should be agreed upon, or otherwise, as they should think fit, as a school; and that the children and grand-children of his relations, whom

* *Braund v. Earl of Devon* (1868) L. R. 3 Ch. 800, 805.

he named, should be placed there for their education at the age of seven years and till fourteen; then to be placed out apprentices with a suitable fee. He also directed, that such other boys and girls should be placed at the same school as the trustees should think fit, the boys to be in a double proportion to the girls; that this foundation should be under the visitation of the Mayor of Bridgewater; and that there should be an inscription of the founder's name and benefaction over the door. The heir and next of kin claimed, in opposition to this trust, under the statute 9 Geo. II.

1793.
BLANDFORD
v.
THACK-
ERELL.

Attorney-General, Mr. Alexander, and Mr. Campbell, in support of the trust :

As to the personal estate this charitable bequest is maintainable; *Vaughan v. Farrer*, 2 Ves. Sen. 185, and *Cantwell v. Baker*, there *cited as *Gastil v. Baker*; where Lord HARDWICKE was of opinion, that though the trustees could not purchase land, they might hire a house. So under the directions of this will the trustees may take a house from year to year; and may transfer the trust at any time. * * * But, supposing the general charity cannot be maintained, the first part of the bequest for the education of these children and grand-children is good. * * *

[*239]

Solicitor-General, for the heir and next of kin :

[240]

The object of the testator was the establishment of a public charity; making that object in a limited degree persons related to him. * * * If the Court considers it as a personal benefit to them, it must be confined to the lives of persons in being at the time of the will. Grand-children, descendants of persons not in being at the time of the will, are not objects; as it must be confined by the rules of law. * * *

Reply. * * *

LORD CHANCELLOR :

[241]

Upon the first question, would taking a house at will, and fitting it up every year, and removing constantly from it, be

1793.

BLANDFORD

v.

THACK-
EBELL.

a good execution of the trust ? That is not what was intended. I think, the testator intended, that the trustees should either purchase, or take a lease. He was aware of the statute, and trying to get out. There is no doubt, that he meant a permanent establishment. The name and benefaction were to be inscribed over the door. There are all the *indicia* of charitable vanity. I assent to the mortmain determinations. This Court is not to find means of evading the law. There was a good deal of observation at the time upon that case before Lord Northington ; and there was a decree by the MASTER OF THE ROLLS, conformable to Lord HARDWICKE's opinion. I think, the statute meant to prevent a person from adding to land, already in mortmain, by will. By deed, if a man is charitable, and divests himself, he may. If I could find a method of evading the statute, I would not disclose it. This charity cannot take effect as a general charity : but I will not therefore condemn the whole will, but will give effect to this particular bounty to these relations. There is no objection at all to the first part. I do not think, that, because he looked forward to a general establishment, I am therefore to condemn the first purpose. His first object was to form a scheme of education for these children and grand-children. It naturally occurred to him, that there might be some public benefit derived out of this plan ; and that led him on. There would be no objection, if he had educated all the children in Bridgewater during the time the education of the children and grand-children of his relations was going on. I am afraid the trustees have starved the first object by the attention to the ulterior. I do not know that I should limit the apprentice fee. I would give their education and the allowance at fourteen as liberally as the fund would afford.

As to the second point, the wisdom of the law has fixed the time ;
[*242] which is twenty-one years after lives in being. Up to *that time you may have as many springing uses, as you please. You may give a legacy to the grandson of A. born in the life of A. It is a good description of the legatee ; and he would take within twenty-one years after the life of the person in being. Here the bounty ceases at the age of fourteen. The rule of law admits of fourteen years after the determination of lives in being, and

goes to twenty-one years. Therefore all children and grand-children, born in the lives of the different stocks mentioned in the will, may be within the bounty without breaking in upon the rule of law. I should only carry it to the several stocks existing at the time of the testator's death and the children and grand-children born in their life-times. The person within the rule will be a child or grand-child of any of the stocks existing at the testator's death. They will be entitled from their ages of seven to fourteen; and then there is an end of them. A child or grand-child may be born just before the extinction of one of the persons who made the stocks; then the benefit will only go to the age of fourteen; and that is not against the rule of law. I can do nothing now but refer it to the Master to take an account of the real and personal estate of the testator, and declare the disposition, as far as it goes to establish a charity for general purposes, void by the statute: I put it so, as I do not mean to prevent them from taking other children as long as the school is to be kept open for the children and grand-children of the relations: but the children and grand-children of the persons mentioned in the will are to take under the disposition to them so far as the objects are not too remote. The dispositions, except as aforesaid, are to be a trust for the heir and next of kin. Let the trustees lay a plan before the Master for carrying into effect the dispositions of the will, according to that declaration, by the education of the objects pointed out; and let the Master inquire, who are the objects of the testator's bounty according to that declaration.

1793.

BLANDFORD

v.
THACK-
ERELL.

1793.

July 11, 12.*Aug.* 6.LOUGH-
BOROUGH,
L.C.

[244]

ANDERSON *v.* MALTBY.

(2 Vesey Jr. 244—261.)

One partner retired; the others continued in partnership, and failed; in the interval large sums were paid to him, who retired, in respect of a balance due to him on account: under the bill of the assignees of the last partnership upon circumstances of fraud an account was decreed against the partner, who retired, with respect to the period of the last partnership, and refused as to the previous time.

[*245]

IN 1774 upon the dissolution of the partnership of Dyer, Brough Maltby, and his son Thomas Maltby, a new partnership commenced between Brough Maltby and his two sons Thomas and George; and the sum of 6,200*l.* the capital of Thomas in the first partnership was brought into the second to his account. The second partnership subsisted till 1784; when Thomas retired. In May, 1788, the house stopped payment; and in November following a commission of bankruptcy issued against them. Under this commission Thomas claimed as a creditor the sum of 3,628*l.* 11*s.* The commissioners, suspecting collusion, admitted him to prove on condition that his dividend should be retained till the matter should be investigated. For that purpose the bill was filed by the assignees of Brough and George *Maltby against Thomas. By the evidence and the answer the circumstances, upon which the bill was filed, appeared to be these. When Thomas retired, the partnership was in a very embarrassed situation, having been under the necessity of borrowing money upon bond. Bentley, a friend, who had lent them 20,000*l.* without interest and from whom they had considerable expectations, died without answering those expectations; and there was reason to apprehend, his representatives would call in that money. No examination of the books, valuation of the property, or calculation of the debts, took place, when Thomas withdrew; nor was any public notice of that event given otherwise than by changing the title of the firm in the books of the Bank of England and other books from "Maltby & Sons" to "Maltby & Son." After Thomas retired, an account was made out, stating an agreement in 1780, that he should be allowed 7½ per cent. upon his capital, and upon a third of all money borrowed with compound interest. The allowance

upon this last article was reduced by the account of 1784 from $7\frac{1}{2}$ to $2\frac{1}{2}$ per cent. It was stated, that by that agreement Brough Maltby was to indemnify Thomas against all losses. The account also stated the capital of Thomas, viz. 6,200*l.* due from the partnership of Dyer and Maltby; "to legacy and portion 800*l.*" Of that sum 300*l.* was claimed in respect of a legacy of 250*l.* given by the grandfather, who died in 1761, to Thomas, and paid by the executors to his father. The portion was 500*l.* given to Thomas by his father in satisfaction of his orphanage share. The sums borrowed from time to time were carried into the account; and one-third was made his capital. At the conclusion of this account 9,655*l.* 16*s.* 7*d.* was stated as the balance due to Thomas Maltby on July 1st, 1784. This account was signed by Brough Maltby only thus: "Examined June 15th, 1784." The words "and agreed" were written on one side, and, as was said for the plaintiffs, appeared evidently to have been added afterwards. This account first appeared in the books in 1786; and till that time 6,200*l.* appeared in the books to be the sole capital of Thomas. Afterwards the account was carried on upon this footing; Thomas calculating interest upon the balance, and giving credit for what he drew out. When he retired, he had drawn out of the partnership 3,904*l.* After that he received upon the footing of the account from the remaining partners 9,467*l.* 14*s.* 2*d.*; the last payment of which was made a few weeks before the failure.

1793.
ANDERSON
v.
MALTBY.

Upon these facts the bill prayed an account of all sums of money, securities and bills paid to or deposited with the defendant by the partners, and received by him during the subsistence of the partnership, and since, and an account of his share at the time he retired; that the payments made to him should be declared fraudulent; that he should be decreed to pay his proportion of the partnership debts; and, if a surplus should remain after discharging the partnership debts, that the proof of the defendant's debt should be reduced to his share of that surplus.

[246]

The defendant by his answer rested on the account; which, he said, took place shortly after the dissolution; but admitted, it was not entered in the books till 1786. He said, no examination

1793.

ANDERSON
v.
MALTBY.

of the books, valuation of the property, calculation of the debts, or inquiry, which were recoverable, took place when he retired, on account of the relation and confidence between the parties, and because Brough Maltby was to take to himself the profit and loss. He admitted, that the legacy and portion were not entered in the books till 1786; that he did, and, he believed, the other partners did, suspect, that of the debts 22,000*l.* were bad debts, and 27,000*l.* in a precarious situation; that many others, then thought good debts, had since turned out to be bad; and that the solvency or insolvency of the partnership depended on the recovery of the debts. At the death of Bentley, all expectations from him being gone, and there being reason to apprehend, that 20,000*l.* would be called in, which he had reason to think would greatly distress the partnership, he believed, if an allowance was made for the bad and precarious debts, the partnership would eventually have appeared to be insolvent. He said, that having reason to suspect the house to be in an insolvent state in July, 1784, for the reasons aforesaid, and being dissatisfied with its situation, and the manner in which the business was carried on, he determined to quit it, and seek payment from the other partners, but did not know of any immediate prospect of failure. He admitted, there was no public notice of the dissolution, nor any deed or settlement in the books; but said, it was not intentionally concealed, and believed, it was generally known to the creditors.

[247]

Solicitor-General, Mr. Grant, Mr. Richards and Mr. Cooke,
for the plaintiffs :

The question is divisable into two heads; first, whether the defendant is to be considered as a creditor in respect of the sum he has proved, secondly, whether he can be compelled to refund any money he has received, and to pay any proportion of the debts of the partnership at the time of the supposed dissolution. A partner knowing the partnership to be insolvent cannot fairly take out of the fund for payment of the partnership debts any proportion of the effects. Every transaction of that kind is fraudulent with regard to creditors of the partnership and persons dealing with them. * * *

*Attorney-General, Mr. Mansfield, Mr. Graham, Mr. Emlyn
and Mr. Abbott, for the defendant :*

1793.

ANDERSON

v.

MALTYBY.

[249]

The plaintiffs can have no equity, which the persons they represent could not state. I admit, no arrangement among partners could turn a partner into a creditor against creditors of the partnership : but it was competent to these three in 1784 to dissolve their partnership, and convert Thomas into a creditor as against them. When the assignees of the two come against the third, they must come against him either as a partner, which they do not affect, or because he is indebted to them ; and if they say that upon the ground, that this is a fraudulent settlement of accounts, that is a pure question at law. Attending to all the circumstances, there is no principle or authority at law or in equity to shew, that this was fraudulent against any person. All the creditors prior to the year 1784 are satisfied except two, who agreed to take the bond of the two. It is not contended *that the private agreement between them would protect Thomas Maltby from liability to the creditors of that partnership, in which he was concerned : but that transaction of 1784 took place upon the principle on which your Lordship would have ordered it, if they were then solvent ; and there is no ground for the Court to say, the transaction should not have been settled upon the same footing, as if this was that year, and they were now about to settle. * * *

[*250]

LORD CHANCELLOR :

Consider, whether it is not of absolute necessity, that the account should be taken from the single circumstance of the portion ; which cannot be supported as a gift. The portion, brought into this account, and entering into all the balances, and carried on with that interest, and that accumulated, must of necessity open the account, if there was nothing else in the case ; for all payments were made to him as the supposed balance of an account, which is undoubtedly erroneous. The way, in which this case strikes me, is this ; first, I am with the defendant thus far, that the plaintiffs cannot support any case upon fraud committed as against the creditors of the former partnership.

1793.
 ANDERSON
 v.
 MALTBY.

[*251]

Then I take the fact to be, that there was a private dissolution in 1784. The name of the firm was changed; but without public notice or advertisement of it. It is private in that sense. This account, though by reference an account as of the date of 1784, was in truth of 1786. It is a transaction between a father and brother, partners, and a son and a brother, no partner. It is a transaction as upon a supposed settlement of accounts without any examination of the books, discussion of vouchers, estimate of stock made up; a way, in which no partners ever settle their accounts upon a dissolution. There are some singular items in the account; and this general observation *applies to it, that the account, as it now stands, has no support in the books. There are no corresponding entries in any of them, from which it can be said to be extracted. Then upon the admission of the events, that made the defendant desirous to get out, this settlement taking place two years after the new partnership commenced, and two years before it failed, I doubt, whether it was not a colour and fraud to play the property into the hands of the partner himself. Then there is another question, if the case turns out so, whether it is more properly a question at law or in this Court. * * *

[254]

For the Defendant :

[*255]

* * * As to the errors now argued on, this is not a suit to rectify an account but to overthrow it. It is brought to this point, that if partners cannot pay all they owe, one of them cannot retire, *except in fraud of the creditors. There is no authority upon that point: it is at least new.

LORD CHANCELLOR :

When partners make up an account of profits, which do not exist, it is colourable. Here as the trade was not profitable, the accounts are fallacious. The defendant knew, whether there was a profit in a given year or not. Assignees have all the equity, the creditors have, and may impeach transactions, which the bankrupt himself would be stopped from impeaching.

The only doubt I have is, whether I shall direct an inquiry in

the office of the Master, or put this matter into another course ; for, as to letting the transaction stand, this could not be called a court of equity, if it could be supported in the extent to which it has gone. The cause has gone into a great deal of argument by letting in what does not strictly apply to the case. The relief, the assignees have prayed by their bill, goes a little farther than the Court could be warranted in going ; for they pray to rescind this transaction for the purpose of having repaid all sums of money received during the partnership of the three, the present plaintiffs having no right on behalf of the creditors of the three to press that. All payments made during the partnership, if improper, being to the prejudice of that partnership, may be declared fraudulent : but upon this bill I cannot decree in respect of that part of it. Whether any one has a right to call the defendant to an account for that, it is clear, the present plaintiffs cannot have that account or payment upon that score. But as to all the rest, except what he received before the year 1784, there is a plain ground. This case originated in the claim of the defendant and proof of his debt under the commission of bankruptcy. An examination into that took place ; and the assignees were instructed, that there was a ground, not only to dispute his claim, but to contend, that, instead of being a creditor, he was a debtor to the estate of Brough and George Maltby. The bill, necessarily stating a great deal of the transactions antecedent to the partnership, contends, that all the sums he has received during the present partnership were received without any just or legal consideration, and therefore in respect of them all he ought to be accountable to the estate of which the plaintiffs are trustees. The case being so stated, it is of necessity, *that I should entertain the bill, and direct an account ; and it must be of all dealings and transactions between Brough and George Maltby the bankrupts and the defendant Thomas. The dealings and transactions, appearing in this bill, are confined to payments, supposed to have been made to the defendant under a claim, set up in consequence of a transaction, which took place upon the dissolution of the former partnership ; which I hold to be well and completely dissolved. He insists, that upon the 1st of July, 1783, Brough and George, entering

1793.

ANDERSON
v.
MALTBY.

[*256]

1798.

ANDERSON
v.
MALTRY.

•

into a new partnership capacity, were indebted to him ; and I do not distinguish between them ; because I think, George is affected as well as Brough. He entered into the partnership ; and has *de facto* assented. The defendant insists upon the settlement of accounts of the preceding partnership ; and claims a large balance ; and says, the payments, made to him, were in discharge of that balance. This state of the case necessarily leads to the consideration of the account, which took place. If at the close of the former partnership he was *bonâ fide* entitled, all the payments were just and legal : if he was not *bonâ fide* entitled to any demand on account of the former partnership as against the two about to form a new partnership, but that to the knowledge and conviction of all three was mere colour, and not a real but a nominal transaction, all the payments were made not merely without consideration, but upon a bad consideration, and such as a court of equity, and I think a court of law equally, ought to condemn. Two circumstances at first struck me as singular. It is a case of very large payments, made during the short period of four years, in the partnership of the father and one son, springing out of the partnership of the father and two sons. Above 9,000*l.* was paid out of the cash of this partnership to the son in that short time. It requires some explanation to account for the passage of so much money between such near relations ; still more on account of the additional relation, in which they stood as partners for ten years antecedent to the commencement of this partnership in 1784, and as the former partnership was not concluded in the usual way of investigation of accounts and estimate of the stock and the share of the retiring partner. When we go a little farther, upon an examination into these accounts, made by an accountant, there is a singular concurrence of two circumstances, which have made a considerable impression on my mind ; one, that the new partnership, commencing in 1784, did not hold many weeks after the payments to Thomas had *brought him home all that balance supposed to be due to him ; the other, that upon the dissection of the accounts by the accountant it turns out, that there is a loss upon a balance of about 17,000*l.* ; which is pretty near the amount, which the defendant, if all his claims are allowed, will

[*257]

have got out of the partnership. The account exhibited, which is set up as a bar to all inquiry, has on the appearance of it one or two singular circumstances. The 500*l.* portion was a mere gift; and could not be set up against creditors. It is always mentioned in the account under the name of portion. As to the 300*l.* upon the answer, I cannot conceive that can stand as without error. Besides that, upon the first account there is an allowance of $7\frac{1}{2}$ per cent. as a profit calculated as well on the capital as on a third of all the money borrowed. I do not say, that in all cases such an allowance would be an improper statement in an account: but this is a singular case; for all the risk of that borrowed money and the expense is taken off by the consent of the other partner from him, in whose behalf it is stated as a profit. If he was totally discharged as among themselves, it can be considered as nothing more than money borrowed to the use of the trade, and by no means as constituting part of his capital. There is no consideration. The profit upon that should be allowed only to the partner, who as among themselves ran the whole risk; for in fact, if it is to be considered as part of the capital of anyone, it is his only who takes the whole of that debt upon himself. There is another thing upon the view of this account. The account is not entered in the books till 1786. In the books there is no account taken as between the partners at the period of the dissolution. The books are a blank as to that. This came into the books in February, 1786. It is supposed to be carried on from the beginning of the partnership as an account from year to year with rests; for rests always suppose it to be from year to year; first from 1774 to 1775, and so on; and in each year $7\frac{1}{2}$ per cent. is allowed upon the capital. As between strangers any allowance may be made, which the law will justify, and the parties think fit. But though there is no annual account in the books of the partnership, and it is admitted, it is not justified by any annual account existing in the partnership books, it is made up at the end of ten years. Were there any profits received? The answer, that Brough admits it, is not satisfactory: that is to charge himself and George as with a profit of $7\frac{1}{2}$ per cent. The defendant was an active partner, had inspection *of the books, a

1793.
ANDERSON
v.
MALTBY.

1793.
ANDERSON
v.
MALTBY.

private book of his own, and from time to time a continual inspection of the partnership. Unless there is a real profit on the books, it is allowing him nothing. It is moonshine; and the whole account is a mere fictitious account. It is in consideration upon the face of the account of a supposed profit. Did he not know, whether there were profits, or not? He cannot avail himself of the fairness of the proceeding. He knew the ground of the allowance and the state of the trade. When we farther inquire into the circumstances of the dissolution, the passages, I have selected from the answer, state these circumstances. The defendant admits, he had reason to believe the house to be in an insolvent state on July 1st, 1784; that he quitted the house, because dissatisfied with its situation. He states the transaction of the loan from Bentley; and as to the consequences of calling in that money, he says distinctly, that he is perfectly satisfied it would greatly distress the partnership; and then, having reason to suspect it to be in an insolvent state he determined to quit it, and seek payment from Brough and George Maltby. He states, that no actual settlement of accounts took place. Why not? Because both parties were acquainted, and nearly related, and from the confidence, which subsisted between them. That is the only honourable excuse. But no valuation was taken of the outstanding debts, no inquiry made with regard to them. He admits also, that he was not at all uninformed of the state of the trade; that 22,000*l.* were bad debts; and he makes a distinction, I think without a difference, between those and others, to the amount of 27,000*l.* which, he says, were precarious; and he states plainly, that, if a proper allowance was made upon just and reasonable grounds for such as ought to be writ off the books, the partnership would have eventually appeared insolvent. How can you translate this otherwise than thus; that a calculation having been made, for it was no new fact, but a fair statement of their affairs having been made, at that period, they were in an actual state of insolvency; and he states, that he then determined upon the considerations mentioned, "upon the considerations aforesaid," to retire, and get payment from the remaining partners. As to the first part of that resolution, I impute nothing to him. I should

applaud the prudence of it. As to the last how and whence was that to issue? The sequel demonstrates how. If the defendant had then gone off with the cash, you know what the denomination of that act would have been. He only *draws his name out; and a new account was entered in the bank and other books. Shortly after, but it is not said when, the other account was made up. It never came into public notice till February, 1786; when it was entered in the book; and upon the foundation of a supposed profit, having no existence, arising annually, by means of compound interest a considerable balance was produced in favour of the defendant. Was his father to pay that absolutely, or his brother? Was it on the personal credit of the partners he rested? If he had got payment from them I should have applauded his prudence. If he had, whatever was his interest, consented to take his share with them, and break the loss, it would have been honourable: but I will not hear him call for a determination in the case of a partnership, confessed insolvent, to procure payment, not from the two partners, but from the creditors, when they continued in trade, the last payment to him was in April, 1788, and they stopped in May, 1788. It is a transaction very difficult to sustain in any court of law as well as of equity. It depends a great deal upon the facts. It depends also upon the judgment that would be formed upon them. The case resolves itself into a plain question; whether in 1784, upon the 1st of July, the defendant was *bonâ fide* a creditor of the other two, then about to enter into a new partnership. If not, if all this transaction is to be void, under the colour, in which it presents itself to me, it is an imposition, not upon them only, because they were consenting, but upon the creditors; who must deal with the partnership of the two, contrived upon a certain foresight of bankruptcy at no very remote period, though the exact time was not certain, managed between persons of the same family, by which the creditors of the two have been losers exactly to the amount of what he has received. The only doubt, I have, is, whether I should better attain the justice of the case by directing an account of all transactions between Brough and George Maltby from the commencement of their partnership, for it can go no farther back, and the

1793.

ANDERSON

v.

MALTBY.

[*259]

1793.
 ANDERSON
 v.
 MALTBY.

[*260]

defendant, with an inquiry into the state of accounts at that period between them, to see, whether there was any consideration whatsoever, upon which he could be a creditor : for, if it was all moonshine, and there was no property, upon which any account could be made out, it is all an imposition, to create a false credit to themselves, and to give him the name of a creditor, when in fact he was none ; *and a mere device to draw the money of other people from the new copartnership into his pocket. Whether this should be done in the Master's office, or by discussion of an issue at law, is a point, upon which I doubt. Consider, which will best attain justice. As to the last, it depends so much upon writing and accounts, that it will hardly come within the period in which a trial at law can be had with advantage. I do not think it a case, in which, if a trial can be had, I should be unwilling to have the assistance of a jury to decide it. But I would not let it go to an action ; but certainly would direct an issue ; for I must take care to have the true question tried exactly upon the merits in equity, which affect the real justice of the case, and not upon the points, not relating to that, which would be made in an action. I agree with the defendant, that if any of these payments cannot be recovered at law, there would be no equity for it. There can be no difference between a court of law and of equity as to this. The true question for an issue would be, whether the partnership was indebted to the retiring partner on account of his share in the partnership.

It was then said, the agreement was the transaction of Brough Maltby only, and that George Maltby was not implicated in it ; that he was not liable to account ; and there was no evidence to constitute it a debt from him ?

LORD CHANCELLOR :

I have always considered, that the new partnership was made up of the old partnership ; the defendant retiring, and leaving every thing there ; though, if that is in reality nothing, there is no consideration, and therefore it is all a fiction. But if the account was settled, which they make the consideration of his

going out and of forming the new partnership, taking all into it, George by entering into the new partnership, distinct from any positive assent, would make himself liable to all the consequences of the account. It could not be the separate debt of Brough, unless in the new partnership Brough took to himself all the property of Thomas. If these payments were not made upon a supposed debt of George, what becomes of the plaintiffs? What have they to do with it?

1793.
ANDERSON
v.
MALTRY.

On the 6th of August the LORD CHANCELLOR decreed an account; being of opinion, that it could not be determined by an issue, and that it must come to an account at last.

[261]

DUNGEY v. ANGOVE.

(2 Vesey Jr. 304—313.)

Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger under a title adverse to that of the landlord. On suspicion of collusion an inquiry into the circumstances was directed; and the report confirming the fraud, the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor; the latter to shew cause why he should not be struck off the roll.

1794.
Jan. 24, 27,
28.

LOUGH-
BOROUGH,
L.C.
[304]

IN 1778 Dungey being in possession of premises belonging to Angove took a lease from him for twenty-one years. Under that lease he paid rent eight or nine years, till notice of ejectment was served upon him under a title of Hernal adverse to that of his landlord. This ejectment was non-prossed: but the tenant on account of it refused to pay any more rent; and filed a bill of interpleader. The answer of Hernal was taken without oath. The case, he set up by his answer, was, that though the legal estate was in Angove, yet it appeared by a decree in another cause, that after certain incumbrances discharged he would stand as trustee for Garveth; and that Hernal had a *post obit* of Garveth accompanied with a demise of the land. It appeared in the course of the cause, that Hernal had sold his claim to Stephenton, who was not a party; but acted as solicitor for the plaintiff. The rent had been paid into Court by the tenant. The affidavit, on filing the bill, was not in the usual form; but to this effect:

1794.
DUNGEY
r.
ANGOVE.

“that the bill annexed is not with the consent, knowledge, or combination, of either of the defendants therein mentioned; but merely of this deponent's own free will.”

Upon the opening the LORD CHANCELLOR expressed his surprise at this bill; which he said ought to be dismissed with costs upon the face of it; being an interpleading bill brought by a tenant under a lease against his landlord; because a stranger set up a title adverse to the landlord. [His Lordship finally directed an enquiry at whose instigation the bill was filed, and when and by whom the notice of ejectment was served on the plaintiff, and what proceedings were had thereon, and the master was to report all material facts and circumstances.

On the 5th August, the report confirming the fraud, the bill was dismissed. The plaintiff and his solicitor were ordered to pay all the expenses of the defendant Angove as between solicitor and client, and the solicitor was ordered to shew cause why he should not be struck off the Roll.]

MASSEY *v.* DAVIES.

(2 Vesey Jr. 317—323.)

1794.
May 10, 12.
ARDEN, M.R.,
for the LORD
CHANCELLOR.
[317]

An agent, who was to have no emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal on his own account. Timber purchased for a colliery: before it was applied to the use of the colliery some of the owners retired; and it was paid for by those only who remained; the former owners are not necessary parties to a suit by those, who remained, against the vendor on account of that sale.

Bill for account of profit made by breach of trust, and injunction to prevent recovery at law of another sum under the same circumstances: upon the answer coming in the injunction was dissolved, and the money paid under the action; not necessary to charge that fact by supplemental bill.

STANLEY MASSEY and John Stanley were with other persons joint owners of a colliery. Davies was their agent and manager. Before he became so, it was usual for the owners to allow the agent some emolument arising from supplying the colliery with candles and other articles, upon which he obtained a profit: but when Davies became agent, it was expressly stipulated, that he

1794.
MASSEY
v.
DAVIES.
[*318]

should be paid by a given salary ; which was at first 60*l.* per annum but was afterwards increased to 80*l.* ; and that was to be his sole profit. In June, 1790, a lot of timber was purchased at the price of 250*l.* for the use of the colliery from Davison, *as it appeared by his receipt and the books of the colliery. This timber, though supplied in June, was not applied to the use of the colliery till July, when Stanley Massey and John Stanley had become sole owners ; and it was paid for by them. In 1791 another lot of timber was purchased from Davison, as it appeared, in the same manner. It was afterwards discovered, that these lots of timber were supplied by Davison and Davies jointly ; the latter being admitted into partnership in that concern : but it did not appear, that they were partners in any other business. Upon this discovery Davison and Davies brought an action for the price of the last lot of timber, which had not been paid for ; and obtained judgment. Stanley Massey and the administrator with the will annexed of John Stanley then filed a bill praying, that the defendants Davison and Davies might be declared entitled only to the prime costs of the timber without any profit, and might account for the profits already obtained, and be restrained from proceeding farther in the action. When the answers came in, the injunction was dissolved, and the money paid under the judgment.

The defence set up by Davies's answer was, that he entered into this concern with the express consent of Stanley Massey : but the evidence proved only, that he had informed Stanley Massey, that he had entered into that mode of dealing with a man at Liverpool. Davison did not live at Liverpool. Davison by his answer denied all knowledge, that Davies was not authorised by his employers to join him in the concern.

Two objections of form were made at the hearing ; first, that the first lot of timber having been supplied, before the plaintiffs became sole owners of the colliery, they had no right to bring this bill without the other partners : secondly, that a supplemental bill was necessary to charge the fact, that the injunction had been dissolved, and the money paid under the action.

It was also contended, that if the plaintiffs were entitled to any remedy, it was to damages at law.

1794.

MASTER OF THE ROLLS :

MASSEY
 v.
 DAVIES.
 [*319]

This cause stands for judgment, not from any difficulty, that I had, but merely because I had not time, when it was argued, *to give my opinion in the manner I wished. The case made is not important in point of value: but in point of precedent and example it is very important; so much so, that I should be sorry, if any doubt could be supposed to exist, that the plaintiffs have a right to demand any profit made by the defendant by a breach of trust in the employment, with which he was concerned in the colliery. The defendant does not deny, that he ought not to have engaged in any such trade without the consent of the plaintiffs; and the defence set up is, that he was authorised by Stanley Massey to commence that mode of dealing with Davison to supply the colliery on account of them, and to derive a profit from it. The counsel were aware, that it was impossible to contend, that unless the defence set up was verified, this bill is not well founded. As to the two objections of form, I was struck with the first: but I do not think, in this stage of the cause and under the circumstances that it will avail. It is true, upon the face of the bill it appears, that down to July others were concerned as partners; and it also appears, that the sale was made in June. If therefore this timber had been supplied, and paid for (for it is all paid for) by the other partners, as far as the bill seeks to call back any money paid in their own wrong, these two plaintiffs cannot have the sole benefit. But it does not appear, that whatever was the case with regard to the time, when it was supplied, it could be applied to the use of the colliery till after July: but the contrary appears. The whole benefit of it was applied after these two became the owners; and they paid for it. Besides this objection ought to have come from the defendant himself. He has not said so: but his counsel have endeavoured to fix this as money paid on account of all the partners. Unless there is evident proof, that they have contributed, I shall set my face against that objection. Upon these proceedings I must take it for granted, the first money, that was paid, was out of the stock of the plaintiffs only.

The second objection is very important in point of precedent. It is insisted, that whatever the right of the plaintiffs was, they

could not obtain it upon this bill, originally an injunction bill, without a supplemental bill charging a fact, that has made, it is said, a material alteration, since the bill was filed. It struck me, that if this is the case, there must always be a *supplemental bill in every case, where a bill is filed to prevent the payment of money at law, and the injunction is dissolved, and the money paid. It occurred to me, that the practice was not so. If upon the face of the bill the equity is merely this, that the defendant as agent shall not have profit out of a transaction between himself as agent and his employer as principal in a particular concern, though the plaintiffs cannot succeed in an action, yet the equity remains. Therefore there is no reason to say, that because the defendants have recovered at law that, which upon the face of the bill they, or one of them at least is not entitled to retain, a supplemental bill is necessary. It is a relief, that arises out of the very relief prayed by the bill. The plaintiffs prayed more than they could have. They prayed an injunction to prevent the payment of the money. Therefore there is an end of the objections of form. Then I am sure, unless another objection, which was insisted on, can avail, that as to the merits of the case the counsel felt distressed to argue, that if the answer was not supported, an agent who was to have no emolument but a salary, could without consent contract with his employers to supply them with articles, which he was to supply as agent. But it was insisted, that the plaintiffs were not in a situation to be entitled to recover it back by a bill in equity; that is, if a man in breach of trust charges to the person, who employs him, more than he ought to have charged, that the person so injured cannot recover it, either by an action for money had and received, or by a bill in equity; but ought to recover damages in an action for breach of the agreement. It is clear, if a person makes any profit by being employed contrary to his trust, the employer has a right to call back that profit. *Lord Lonsdale v. Church*, 3 Bro. C. C. 41, was a very hard case. It was meant, that the man should have interest when they first employed him: but being a public officer making use of public money out at interest when I thought, his employer had a right to that interest improperly made. It is admitted, that if a servant charges his master with

1794.

MASSEY

v.

DAVIES.

[*320]

1794.

MASSEY

v.

DAVIES.

[*321]

more than he actually paid, the master may recover in an action, or bill, if a bill would lie at all: but it is contended, it would not. How am I to prevent such frauds as these, but by giving the relief I am now called upon to give? Where a man undertakes to buy for me in the most beneficial manner, what my colliery shall *want, can it be possible, that I can trust him to sell those articles to me himself? The clearest evidence is necessary to shew consent. It is opening a door to a monstrous fraud. I know, there are cases, in which that authority has been given. There are patent offices, which I hope, when they expire, will never be renewed; where the parties have a right to supply articles to public offices, and charge so much per cent. upon what they pay for those articles. That is an improvident grant and emolument: but it is not concealed. Such bargains will not be made in future. But these plaintiffs say, they have found out, that when the agent pretended to buy from Davison, he bought from Davison and himself; and they desire, that he shall retain nothing but the prime cost. Has any such consent, as is alleged, been proved? He says Stanley Massey gave him authority not only to commence timber merchant, but to supply the colliery with such articles as he might as a timber merchant. This is in the answer, but so far from being proved, all he can prove by all the conversations prior to, and after, his discharge is, that Stanley Massey did admit that he had given him leave to enter into the timber concern with a man at Liverpool; not with Davison, the person who supplied the colliery; and that Stanley Massey denies. There ought to have been the strongest evidence of consent. But what is much stronger, and what without evidence I should have held *primâ facie* evidence against the defendant to throw the proof upon him, is the manner in which it is charged. Davison was the man in the habit of supplying the colliery. He takes this man into partnership. It does not appear, that he had any other concern with Davison than in the articles he supplied to the colliery. It was entered in Davison's name only: the other was studiously concealed, and the voucher was a receipt by Davison only as for timber supplied by him only. Is it possible to believe, that if he had the authority, he represents, he would have had any scruple of avowing the part he took in the busi-

ness? It is said, he could not give the receipt, because he was the man who paid the money: but he might. If Davison took it for his partner, why not say received for himself and Davies? So the other in the books is put down as bought from Davison only. But when it was found out, then the agent delivers a bill with his own name in it. He says, he had licence to sell timber to them, if he thought fit; that he was loth to do it on account of his delicate situation; and mentions two men, who applied to *him, and told him, timber was wanted for the colliery, and says, he sent them into Wales; that they afterwards told him, they could get none there; and then they asked, whether he and Davison had not some, and whether they could not let them have it. He agreed; but said, it must be at sixteen pence a foot; and he desired, when they were going to value it, that they would be sure not to put a greater value on it than it ought to bear. They only say, they valued it at a fair price. There is no imputation upon the price as between a timber merchant and a person buying from him. Am I sure, he would not let them fix the price higher than that, at which he would have purchased from anyone else? He has secretly gone into partnership, and bought from his partner and himself timber, which he has supplied to his employers, and he has made a profit: that is made in breach of his trust, and must be refunded from his pocket.

Davison denies, that he had any knowledge, that the agent was not authorized by his employers to join with him; therefore as between him and the owners I do not think I can hold him answerable for any profit he has made. I suspect a little, that he had some reason for admitting Davies; because he was the agent of the colliery; for there seems to be no other reason; and I know, it is a common practice for servants to be fed by tradesmen for the sake of their master's custom. Yet upon the face of this answer I cannot, nor is it much pressed that I should, hold, that Davison knew, Davies was acting contrary to his trust; otherwise I would certainly hold Davison bound; for in the case of a servant, not only the servant acting contrary to his trust, but a man, who knowing the servant was guilty of a breach of trust, entered into the transaction with him, would be answerable. But Davison must be held to have completely denied all know-

1794.
MASSEY
v.
DAVIES.

[*322]

1794.
 MASSEY
 v.
 DAVIES.

[*323]

ledge of any such breach of trust. It has been urged, that this is contrary to the positive answer of Davies. I do not like to suspect men of swearing falsely : but what is a strong corroboration is, that if he really had this conversation with Stanley Massey, why did he not file a bill of discovery to ask him about it? He has not dared to do that. It is said, he is not so well able to file a bill as the plaintiffs : but where the whole cause turned upon that, he would not have scrupled to do it, if there had been any foundation for it. Therefore as to all the profit made by Davies he is liable to refund. As to Davison the bill must be dismissed with costs : but he must undertake, *that all their books shall be produced; otherwise I will not dismiss it with costs.

By consent it was ordered, that sworn copies should be supplied with liberty to compare them with the books.

1794.
 May 14, 21.

Rolls Court.
 ARDEN, M.R.

[328]

KIGHTLEY v. KIGHTLEY.

(2 Vesey Jr. 328—332.)

This clause beginning a will, "First I will and direct, that all my legal debts, legacies and funeral expenses shall be fully paid" is not sufficient alone to charge legacies on real estates specifically devised; for which the intent must be clear.

JOHN KIGHTLEY by his will disposed as follows :

"First I will and direct, that all my legal debts, legacies, and funeral expenses, shall be fully paid and discharged ; and that my executor and executrixes hereinafter named do and shall bury me in a decent manner in the churchyard of North Crawley as near to the graves of my late deceased wife and mother, as possibly may be ; and that they cause to be erected and set up in remembrance of my said wife and mother and myself a neat monument, the expense of which I will and direct shall not exceed 10*l*. Next I give and devise unto my niece Sarah Read and her heirs all and singular my messuages, cottages, closes, lands, tenements, and hereditaments, whatsoever situated in Broadmead End, to hold to her, her heirs and assigns for ever." He then devised another

message to his cousin Mary James in fee ; and also gave her all his household *goods, furniture, linen, china, plate, stock in trade, and brewing utensils, in the same. He devised to Catherine Kightley another estate in fee ; and also gave her a legacy of 100*l.* to be paid at twenty-one or marriage, with interest from his death ; in case of her death before that time, to sink into the residue ; with directions to apply the rents and interest for maintenance and education. He then gave to Sarah Boutflour 150*l.* part of a sum of 480*l.* secured by mortgage, to be paid within four months after his decease ; to Mary James 100*l.* and to Mary Barret 50*l.*, other parts of that sum, to be paid within twelve months after his decease ; and 180*l.* the residue of that sum to Robert Andrews, the mortgagor, upon trust to pay the interest to William Kightley and his wife, for their lives ; and after the decease of the survivor, he gave the principal to Robert Andrews, his executors, administrators, and assigns. He also gave to Sarah Read 80*l.* ; to John Marshall 30*l.* ; to Elizabeth Marshall 20*l.* to be paid within twelve months after his decease ; to the poor of the parish 5*l.* to be paid within one month after his decease ; another legacy of 5*l.* : he then gave all the rest and residue of his real and personal estate to Robert Andrews, Sarah Boutflour, and Mary James ; and appointed them executor and executrixes.

1794.
KIGHTLEY
v.
KIGHTLEY.
[*329]

The bill was filed by Catherine Kightley, John Marshall, Sarah Read and Mary James, with their husbands, for an account of the personal estate ; and if it should prove insufficient to answer the legacies, that so much of the real estates devised should be sold, as would supply the deficiency. The usual accounts were directed ; and by the report it appeared, that the personal estate was very insufficient ; and that most of it had been applied in paying debts.

Upon farther directions the question was, whether the legatees were entitled to have the devised estates sold, and the produce applied in satisfaction of the legacies.

Mr. Lloyd, Mr. Graham, and Mr. Alexander for the plaintiffs:
From early times such words have been sufficient to charge
R.R.—VOL. II.

1794. debts. There is no difference between simple-contract debts and
 EIGHTLEY legacies upon this question: both depend on the intention. Can
 v. it be said, he intended to charge debts, and not legacies? *Trott*
 EIGHTLEY. *v. Vernon*, Pre. Ch. 430, is an authority for the legatees; and
 [*330] *there are many other cases in Mr. Finch's note. In *Millard v.*
Pancoust at the Rolls, 21st June, 1793, which was on the very
 same words, the estates devised were ordered to be sold on a bill
 by a legatee.

Mr. Wooddeson, for the devisees:

There is a great distinction in all the cases between debts and legacies. As to the former the Court have gone upon a slight implication and a moral principle. In *Trott v. Vernon*, better reported 2 Vern. 708, it was a general devise of all his lands; and the devisee was heir at law: but there is no case, where a specific devisee of a particular real estate set apart from the rest has been forced to contribute. It would be very absurd in this case, if the house given to Mary James should be liable, and not the furniture in it, which is also specifically bequeathed. The mortgage debt, which he has distributed in several proportions, certainly was not intended to be broken in upon. He thought, there would be a residue; for one of the legacies is to fall into it in case of the legatee's death before it is payable.

MASTER OF THE ROLLS:

There is no doubt as to debts; but as to legacies there must be a clear manifest intention, that the devisee shall take subject to the legacies. The difference between *Trott v. Vernon* and this case is, that in the former the words were "that all my debts, legacies, and funeral expenses shall be paid in the first place." I will consider of it.

May 21. MASTER OF THE ROLLS,† after stating the case:

It has been contended, that under the first clause of this will, "First I will and direct, that all my legal debts, legacies, and funeral expenses, shall be fully paid, &c." where the testator has charged his real estate by will duly attested, both debts and

† The judgment *ex relatione*.

legacies shall take place of every other disposition ; and that the legacies shall stand in the same place as debts ; even to the disappointment of the devisees ; and that there is no reason, why *they should not have the same preference. The principle however is perfectly different ; the one being purely, voluntary, the other obligatory. Wherever a man makes a will, he is supposed to do that, which conscience obliges him to do ; and if he shews an intention, that his debts shall take place of every other disposition, and that he meant they should be paid, the Court will strictly enforce that intention. The same principle will not apply to legacies, which have been attempted to be put upon the same footing : but it does not follow, that where a testator says, “ In the first place I will, that all my debts and legacies shall be paid ; ” and then gives certain legacies ; and at the latter end of it repeats these words, that such legacies as well as his debts shall be a charge upon the realty ; and that because the latter must have a preference, the former shall also have it. The estate so contended to be charged is specifically devised ; and I cannot see any reason, why pecuniary legacies should have any preference to such specific devises. If I was to direct these legacies to be so raised and paid, it would be giving them that undue preference. It has been argued, that there are words in this will strong enough to shew the testator’s intention, that the legacies in question should be so raised : but I am of opinion, no such construction can be put upon them. They will not bear such an inference. *Trott v. Vernon* has been much relied upon : but upon looking into that case it appears, that the decision was founded upon words, that do not occur in this instrument. It is contended, that the parties should not take the general estate, till after everything else is disposed of ; and that even the devisees should not, according to the plain intention of the testator, take any benefit, until the pecuniary legatees are paid ; and that it is clear, he meant so, because he has in the first clause of his will expressed such an intention. It would be absurd to lay any stress upon, or give any preference to these legatees in consequence of, the order, in which these gifts or voluntary bequests are contained. *Trott v. Vernon* indeed may afford some reason for the argument, where the Lord

1794.
KIGHTLEY
v.
KIGHTLEY.
[*331]

1794.
 KIGHTLEY
 v.
 KIGHTLEY.

[*332]

CHANCELLOR says, the words "in the first place" must be intended to give a preference for those purposes to any other whatever : but his subsequent observations shew, that his Lordship did not purely rely upon that circumstance. The question in the present case is, whether without these words in the first sentence, desiring the debts, legacies, &c. to be fully paid, these legacies could be raised out of the realty to the disappointment of the devisee ; or *whether the testator intended, that they should be so raised, and defeat the whole of the devise. On the part of the legatees the only argument, which could be raised in their favour, has been grounded upon the first sentence in the will : but is there in any subsequent one anything, which points out, that at all events the legacies shall be considered a charge upon the real estates specifically devised ? I cannot find out any such intent, or that he meant, that these pecuniary legacies should be paid to the destruction of the gift of the realty. I do not rest upon the circumstance of the introductory clause. No matter whether first or last : I must advert to the general tenor of the instrument to see, what was the intention. No doubt this Court will aid the intention, where a testator affects to charge an estate, which by law he could not do ; and where he means to do it for a valuable or meritorious consideration, it will interpose ; and even supply a defect : but then there must be clear, express, and unequivocal evidence of the intention, that the testator meant to comprehend that estate, and to create that charge upon it, to which the Court is called upon to give its effect ; as, among other instances, in that of supplying a surrender.

In this case it is clear, the testator did not intend, that payment of these legacies should break in upon the real estates specifically devised ; and therefore I do not think, the introductory words for payment of the debts and legacies authorize me to declare, that the legacies shall be raised out of the real estate to the loss and disappointment of the specific devisees.

MALIM *v.* KEIGHLEY.

(2 Vesey Jr. 333—335, 529—533.)

Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death.

Testator by shewing his desire creates a trust, unless plain words or necessary implication, that there is to be a discretion to defeat it.

THOMAS LOWE by his will gave 1,000*l.* stock in trust to pay the interest and dividends to his daughter Anne Malim for life for her separate use, and after her decease the principal among her children ; if no children, to sink into the residue. He gave 500*l.* stock to Elizabeth Thompson, and a similar sum to Sarah Lowe, two other daughters ; and declared trusts, in failure of which those sums should sink into the residue. Then he gave all the rest and residue of his estate and effects whatsoever and wheresoever in trust, as to one-third for his daughter Lucy Rawlin for her separate use for life ; after her decease for her husband for life ; and after his decease for the children ; as to another third, for Elizabeth Thompson for her separate use for life ; and after her decease for her children ; with a proviso, that if she should survive her husband, and marry again, she might by writing under her hand and seal, executed before such marriage in the presence of two witnesses direct the interest, &c. to be paid after her decease to such husband for life ; as to the other third, for Sarah Lowe and her children in the same manner, and with a similar power in case of her marriage ; and in case either of these daughters should leave no children, the share of such daughter was to go to the other two daughters in the same manner as their respective funds.

“ And in case the whole of the residue of my personal estate shall become vested in any one of my said daughters, then I do give and bequeath the same after the expiration and determination *of the several trusts before-mentioned, unto such surviving daughter, her executors and administrators, hereby recommending it to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my said daughter Anne Malim and my nephew John Lowe of Ferry Bridge ; desiring, that his reputed

1794.

June 7.

ARDEN, M.R.

1795.

*March 13, 16*LOUGH-
BOROUGH,
L.C.

[333]

[*334]

1795.
MALIM
v.
KEIGHLEY.

daughter Emilia, though born before marriage, may be considered as one of his children."

The whole residue became vested in the testator's daughter Sarah who married Keighley; and the question was, whether after her decease without issue, and intestate, a trust arose for the children of Anne Malim and John Lowe.

Mr. Lloyd, for the children of Malim and Lowe, plaintiffs :

This was determined in *Pierson v. Garnet*, 2 Bro. C. C. 38, 226, which overturned *Cunliffe v. Cunliffe*, Amb. 686.

Mr. Graham and *Mr. Abbot*, for the defendant :

There was no occasion to get rid of *Cunliffe v. Cunliffe*, in order to make that decision; and what the MASTER OF THE ROLLS says upon the word "recommend" is extra-judicial. There is a marked distinction between that word and "desire" or "request." The argument on this point always begins by saying, whether the clause is recommendatory or imperative. The Court must go on the distinction between the words; which sometimes may be very fine. "Recommend" does not imply volition, but advice. *Ex vi termini* it leaves the party to decide. The person recommending may be extremely indifferent about it. The testator could not mean by this recommendation the same thing, as when he created a power by express words. * * *

[335] MASTER OF THE ROLLS :

I think with Lord KENYON, that *Cunliffe v. Cunliffe* is overruled, that he meant to say, he differed from the Lords Commissioners; and that he should be of the same opinion, if the word had been "recommend." The question is, whether there is any difference between "recommend" and "it is my dying request;" whether the former is not equal to the latter. If I was deciding upon the weight of the words, I rather think "recommend" is stronger than "desire." A great stress is laid upon the word "dying:" but every request by will is a dying request. I will lay down the rule as broad as this; wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shews clearly, that his

desire expressed is to be controlled by the party; and that he shall have an option to defeat it. The word "recommend" proves desire, and does not prove discretion. If a testator shews his desire, that a thing shall be done, unless there are plain express words or necessary implication, that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered as acting under a trust. I will not criticize upon the words. "Recommend" is a request and more. If I request a man to do anything, I recommend it; and *vice versa*. I do not know, how to distinguish them. Therefore declare, that the residue of the personal estate upon the death of Sarah Keighley without issue, and intestate, became a trust for the children of Anne Malim and John Lowe in equal shares and proportions.

1795.
MALIM
v.
KEIGHLEY.

The defendant appealed from the decree.

On Appeal:

Mr. Mansfield, Mr. Graham, and Mr. Benyon, for the appellant;

1795.
March 13, 16.
[529]

By observing the distinction between a recommendation and an imperative direction the whole is consistent. In other parts of the will the testator shews, he knew how to give absolute or limited interests. The word "desire" occurring afterwards cannot have any effect; for the whole of this trust depends on the word "recommend." He might mean to insist, that if his surviving daughter should choose to make those children the objects of her bounty, no difference should be made between those born before and after marriage. He has clearly marked what is a trust and what a recommendation. There is a great difference between a recommendation and a dying request; which is much more solemn. In *Bland v. Bland*, Finch's Pre. Ch. 201, n., Lord HARDWICKE says, a recommendation is not imperative: so Sir JOSEPH Jekyll in *Harding v. Glyn*, 1 Atk. 469, says, where the uncertainty *is such, that it is impossible for the Court to

[*530]

1795.
MALIM
v.
KEIGHLEY.

determine what persons are meant, it is strong for the Court to construe it only a recommendation to the first devisee; and to make it absolute as to him. * * *

Attorney-General, Mr. Lloyd, and Mr. Thompson, in support of the decree :

It is impossible to apply to these cases arguments upon the general meaning of English words; for the law has undoubtedly been borrowed from the civil law; and it is impossible to say, that "recommend" is not æquipollent with the words held in both laws to create a trust. In the passage, cited in *Pierson v. Garnet* from the Digest, Lib. 30, T. 1, 115, 118, the expressions are *cupio, opto, credo, desidero, exigo, uti des*; and the former words are considered equal to "*exigo*, I require." "Recommend" is of equal force. "Recommend" expresses more than absence of doubt, as much as desire, and certainly some hope, that the recommendation will take place. The meaning of the distinction between recommendatory and imperative is, that whatever the words are, if the object and subject are ascertained, the expression of a wish shall control the will of the person, with regard to whose acts that species of wish is expressed: but it cannot have that effect, where that person has a power over the subject, by which that wish may be defeated.

* * *

[531] LORD CHANCELLOR :

There is really no fair analogy to the Roman law; as to which it stood thus: antecedent to the edict there was no method of putting any limitation upon the heir. He took *universum jus defuncti* absolutely. Therefore it could be only by appeal to his honour. The same words continued, when the Prætor came to execute these trusts, which had always been created by supplicatory words. In *Cunliffe v. Cunliffe* a good deal turned upon the nature of the subject devised. From the nature of the subject it could not be more than a recommendation; for he had full power to spend and waste it: the houses were sugar-houses. In this case the surviving daughter could not have used any part of the property: the limitation to her issue would have tied it up. I wish to look into the cases. One case I remember in the House

of Lords, in which a decree of the CHANCELLOR of Ireland was reversed. The testator gave all the personal that he had to his daughter; and the words were extremely strong and very imperative in the terms of them as to what should be done after her death: but a power was given her of spending part of it. From that I conceived, that you must first see what interest the person, to whom the recommendation is applied, takes: if in express terms or by implication he has a power of spending part, or if the nature *of the subject implies it, however strong the bequest is, you cannot hold it an absolute trust; for that is making a will for another man. That is in effect what Lord THURLOW means by making the bequest certain. I think *Cunliffe v. Cunliffe* turned upon it. Where one person recommends to another who is independent of him, there is nothing imperative: but if he recommends that to be done by a person, whom he has a right to order to do it, the mode is only civility.

1795.
MALIM
v.
KEIGHLEY.

[*532]

LORD CHANCELLOR:

I have looked into the note I have of *Cunliffe v. Cunliffe*. It brings the principle to my recollection; for I am perfectly satisfied even upon my note, which is not much longer than that in Ambler, that the ground principally argued, and upon which the decision turned, was, that Sir Ellis Cunliffe had the absolute property of the sugar-houses as well as the other stock-in-trade. The point, on which the decision turned, must have been, that the absolute property in the sugar-houses being given, that could not be controlled by any words added, intimating a desire, in what manner it should be disposed of by him. It turned on the nature of the property, not a critical interpretation of the words. The cases cited were *Eales v. England*, Pre. Ch. 200; 2 Vern. 466; 1 Eq. Ca. Ab. 297: *Jones v. Nabb*, 1 Eq. Ca. Ab. 404: *Kingsman v. Kingsman*, there cited, and reported 2 Vern. 559: *Upwell v. Halsey*, 1 P. Will. 651. Perhaps the determination of that last case may be very much doubted. On the other side the daughters claimed it as an estate absolutely vested in the father; and contended, that those words were only an expression of the grandfather's wish. They cited *Ford's* case, Carey's Rep. 30: *Bland v. Bland*: *Countess of Bridgewater v. Duke of Bolton*, 6

March 16.

1795.

MALIN

v.

KEIGHLEY.

[*533]

Mod. 106 ; 1 Salk. 236 ; Holt, 281 ; 1 Eq. Ca. Ab. 177 : *Attorney-General v. Hall*, Fitz. 314 : *Collis v. Lightbourne*, before Lord Northington. In that last Lord NORTHINGTON said, the Counsel for the appellant contended, that the power of disposition to the daughter means only disposition by will or marriage, not by any other act : but that was a very absurd intent ; she having power to use and spend it. *Attorney-General v. Hall* is to the same effect : the bequest over in favour of the charity, in whatever terms expressed, *was a bequest over after a gift to one with power to spend it. *Cunliffe v. Cunliffe* turned much more upon that consideration than any criticism upon the words the elder Cunliffe had used. That in effect is exactly the same proposition as that laid down by Lord THURLOW in other terms ; “ where the thing given is certain, and the object is certain.” The thing is certain, where the whole property must remain entire during the life of the first person : it is uncertain, where any power is in that person to diminish the amount. Therefore *Cunliffe v. Cunliffe* does not stand in the way of the decree of Lord KENTON in *Pierson v. Garnet* ; and the concurring course of authorities is, that where there is a gift of the absolute ownership, a devise over, in whatever terms conceived, is void. The arguments from the Roman law are not very applicable. The general cases do not turn upon a nice criticism on words ; and I am glad of it. Here it must have remained entire ; and in the words of the recommendation it is plain, it was not wholly *ad arbitrium* of the surviving daughter ; for she must give a part to each of them under the words “ to and among : ” she could not negative the desire to give to the illegitimate daughter. If she had made a disposition, and left her out, that would have been bad ; and they must have taken equally. Under the circumstances of the will it is very clear the decree is right.

Bland v. Bland appears by Lord Hardwicke's note to have turned exactly upon the same point.

BRISTOW *v.* WARDE.

(2 Vesey Jr. 336—351.)

By articles the wife's fortune and an equal sum advanced by the husband were agreed to be settled for the husband for their joint lives, and if he should die first, leaving issue by her, for her for life, after her decease as to the capital in such manner as he should appoint, in default of appointment to be divided equally among the issue at twenty-one with maintenance and survivorship; after marriage in pursuance of the articles an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife, remainder to trustees to preserve, &c., remainder, in case of his death first without issue, to certain uses, remainder, in case of his death first leaving any child or children, to the wife for life, remainder to all the child or children in such shares as the husband should appoint; for want of appointment, equally in tail with cross remainders, remainder to the heirs of the husband. Children only are the objects; and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power; and the doctrine of *cy pres* by giving the child an estate tail is not applicable: but the appointment is void for the excess only; and what is ill appointed goes as in default of appointment.

Testator under a power to appoint among children appointed to the husband of a daughter for life, and if she survived him, to her for life, and having advanced her in marriage, recited that as a reason for giving her a small share: this is not illusory.

Parties taking under a will executing a power of appointment dispute part of it; there being no fund but that to be appointed, it is not a case of election.

Personal estate under marriage articles to be invested in land, or government, or other securities; the Court finding it in its original state considers it as personal; but part having been laid out in land, which was settled, and afterwards sold, and the produce invested in stock, till a proper purchase of land could be found to be settled to the same uses, that was considered as land.

By articles executed in 1793 reciting the intended marriage of John Bristow and Ann Judith Foissin, and that her fortune consisted of 500*l.* her own property, and 2,500*l.* given by her mother Louisa Girardot in consideration of the marriage (reserving to herself the interest of 1,300*l.* during her life) it was agreed, that those sums together with 3,000*l.* to be advanced by John Bristow should be invested in the *purchase of South Sea annuities upon trust to pay Louisa Girardot Foissin the yearly produce of 1,300*l.* for her life; and to pay the surplus of the dividends to John Bristow for the joint lives of him and his intended wife; and in

1794.
June 29, 30.
July 1.
LOUGH-
BOROUGH,
L.C.
[336]

[*337]

1794.
BRISTOW
v.
WARDE.

case he should die before his wife, leaving issue by her at the time of his decease, or leaving her *ensient* of one or more child or children, that should be born alive, to pay the dividends to the wife for her life, subject to the trust as to the 1,800*l.*; and after her decease to apply the capital in such manner, as John Bristow should appoint by any deed or writing attested by two or more credible witnesses, or by his will; and for want of such appointment that the said capital should after the decease of Ann Judith be divided among the issue of the marriage share and share alike at their respective ages of twenty-one; the interest to be applied towards their maintenance and education; with benefit of survivorship in case of the death of any before twenty-one; with a power to the trustees and the survivor, &c. with consent of the husband and wife or the survivor to sell and assign the funds or securities, wherein the 6,000*l.* should have been invested, and to invest the produce in the purchase of government or other securities, or of lands of inheritance in fee-simple, subject to the same trusts. [It was farther agreed, that the after-acquired property of the wife should be held upon the same trusts as the 6,000*l.*]

[338]

The marriage took place; and the several funds were laid out according to the articles. In 1739 with consent of the husband and wife a suit was instituted in the Court of Chancery for the purpose of having the funds sold, and the produce invested in the purchase of a freehold estate in the county of Norfolk; and to have a new trustee appointed in the room of one deceased; and under the decree in that suit by lease and release of the 17th and 18th of March, 1739, the manor of Quidenham, in the county of Norfolk was conveyed to the surviving trustees in the articles and a new trustee for ninety-nine years to secure an annuity of 52*l.* per annum to Louisa Girardot Foissin for life, which she agreed to accept in lieu of what she was entitled to under the articles; remainder to John Bristow and his assigns during the joint lives of him and his wife; remainder to the same trustees to preserve contingent remainders, to certain uses therein expressed, in case the husband should die in the life of the wife without issue, or being such, all of them should die under twenty-one and unmarried; remainder, in case he should

1794.
BRISTOW
v.
WARDE.

die in her lifetime leaving any child or children of her body by him begotten, living at his decease, or afterwards born alive, to the use of the wife and her assigns for life; remainder to the use of all the child or children of John Bristow and Ann his wife in such shares (there being more than one) as John Bristow by any deed or writing under his hand, attested by two or more credible witnesses, or by his last will and testament in writing witnessed as aforesaid, should direct and appoint and for want of such appointment, to the use of the said child or children of John Bristow and Ann his wife, begotten and to be begotten, and the heirs of the body of such child or children lawfully issuing, if more than one, share and share alike; and in default of issue of any of the said children that the share of such child or children having no issue should be divided among the survivors of them share and share alike; remainder in default of such issue to the use to the right heirs of John Bristow for ever. By these indentures it was declared, that nothing therein should prejudice the agreement in the articles for laying out such sum or sums, as should fall to the wife during her coverture, in the manner therein mentioned.

John Bristow continued in possession of the settled estates till 1765, when they were by act of Parliament vested in other trustees in trust to sell; and that the produce should be paid into the Bank in the name of the Accountant General, and laid out in redeemable 4 per cent. annuities, till a proper purchase of lands in fee simple should be found, to be settled upon the same uses and trusts as those of the settlement of 1739: and that the dividends in the mean time should be paid to such persons, as would have been entitled to the rents and profits of the lands under the act. The settled estates were sold accordingly; and the produce laid out in the sum of 20,787*l.* 4*s.* 7*d.* 4 per cent. Bank annuities; and the interest and dividends were paid to John Bristow during his life.

[339]

On the 14th of November, 1768, John Bristow died; leaving his wife Ann and eleven children issue of that marriage surviving. By his will dated the 24th of October, 1768, duly executed to pass real estate he recited the articles, the settlement, the act of Parliament, and the purchase of stock under it;

1794.

BRISTOW
v.
WARDE.

[*340]

* * * [and in pursuance of the power given by the marriage articles he appointed after the decease of his wife to Henry Bristow his eldest son, for his life, certain money comprised in the after-acquired property clause therein contained, (hereinafter referred to as the legacy fund,) and after his decease] to and among any child or children issue of the marriage of his son Henry with his then wife in such *shares and manner, as the said Henry should by any deed or writing under his hand, witnessed by two or more credible witnesses, or by his last will and testament witnessed as aforesaid, direct and appoint; and by virtue of the power vested in him by the said articles he thereby appointed, after the decease of his wife the sum of 20,737*l.* 4*s.* 7*d.* 4 per cent. Bank annuities to and among his children in the shares and manner following: to his daughter Ann Margaret Hobart 1,000*l.* upon trust to pay the profits and dividends to Henry Hobart her husband during his life, and after his decease to pay the same to Ann Margaret Hobart for her life, in case she should survive her husband; and after the decease of both to pay and transfer the said 1,000*l.* to and among their issue in such shares, if more than one, and in such manner, as he or she shall appoint. Then reciting, that on the marriage of his daughter Catherine with General Fraser in 1765 he had appointed to her after the death of his wife the sum of 2,500*l.* to the uses of that marriage, he confirmed that appointment; and farther appointed to her 1,000*l.* to pay the profits and dividends thereof to her for her own use for life; and after her decease he directed the said 1,000*l.* to be transferred to and among any child or children, she might or should have, in such share or shares, and in such manner, as she should direct or appoint; and in case she should die not leaving any children, then he gave and appointed the said stock to his son Henry upon trust for the purposes expressed in the appointment to him thereinbefore contained. He gave to his daughter Louisa Bristow 1,800*l.* absolutely; and to his daughter Frances Neave 500*l.* in trust to pay the profits and dividends to her husband Richard Neave for his life; after his decease to her for life, in case she should survive him; and after the decease of both to transfer the said stock to and among any children issue of their marriage in such share or shares, and

in such manner, as he or she should appoint. The testator mentioned, that the shares of Mrs. Hobart and Mrs. Neave were so small on account of what he had before given them upon marriage. He gave his daughter Mary Bristow * * 800*l.* for her share of the said stock. He gave his three daughters Elizabeth, Caroline, and Sophia 1,000*l.* each; to his son John Bristow 2,000*l.* and to his son William Bristow 1,800*l.*; *and he gave and appointed to his son Henry all the residue and remainder of the said stock in trust for the same uses and purposes as those expressed in the before-mentioned appointment to him. * * He directed, that there should be benefit of survivorship between his five daughters Elizabeth, Caroline, Louisa, Mary and Sophia, in case of the death of any of them unmarried, and before their shares should be payable; and he appointed Ann Judith Bristow, Henry Hobart, and Henry Bristow executors.

* * Henry Bristow, Ann Margaret Hobart, and Sophia Bristow, died in the life of their mother, Henry left two children, George and Catharine Annabella Bristow, but he made no appointment under the power given him by his father's will, and died intestate. Mrs. Hobart left her husband and four children surviving her. Sophia Bristow left a will executed so as to pass personal estate only; and made her sister Mary sole executrix. George Bristow, the son of her brother Henry, was her heir. In 1788 Ann Judith Bristow died, leaving eight children surviving. * *

The bill was brought by John Bristow and other children of the testator to have the several claims upon these funds and their produce ascertained, and the necessary accounts taken.

* * *

The questions were, first, Whether the appointments to Mrs. Hobart and Mrs. Neave were illusory; and therefore the whole was void: Secondly, Whether the appointments to the grandchildren, and to the husbands of the daughters were an excess of power; and if so, whether the former could be executed *cy pres* by giving estates tail to the children: Thirdly, If those appointments were bad, or any of them, whether the whole should be

1794.
BRISTOW
c.
WARDE.

[*341]

[342]

1794.
BRISTOW
v.
WARDE.

void, or the excess only ; and in the latter case how so much, as was ill appointed, should be disposed of : Fourthly, Whether those taking under the execution were precluded by a case of election from disputing any part of it : Fifthly, Whether the funds were to be considered as land or money.

Attorney-General, Solicitor-General, and Mr. Stanley, for the plaintiffs :

This must now be considered as land : but all the parties are competent to say, whether it shall be laid out in land, or not.

* * *

[343]

Under this settlement the children only were intended to be purchasers ; therefore on that ground these appointments, so far as they are in favour of persons not children of the testator, cannot have effect. The power in the articles, though general, must mean among the issue of the marriage ; otherwise he might defeat the purpose by giving to others what was intended as a provision for the issue ; and the fund would be assets, and subject to debts. * * *

[344]

But this appointment, though defective, must not be considered bad in the whole. * * It must be considered void for the excess only ; viz. as to the grandchildren and the husbands of the daughters ; then all not disposed of under the authority of these instruments is unaffected by the will ; and will go among all the children as tenants in common.

LORD CHANCELLOR :

Why may not I construe it an estate tail, in Henry as to the land ?

For the Plaintiffs :

It was intended, that the children should take absolutely by purchase ; not that it should go, as an estate tail would carry it. In *Humberston v. Humberston*, 1 P. Will. 332, the same sort of devolution was intended, as takes place in an estate in tail male. * * *

Mr. Hardinge and Mr. Campbell, for the son of *Mrs. Hobart*, and *Mr. Piggott* for *Mr. and Mrs. Neave* contended that the appointments to *Mrs. Hobart* and *Mrs. Neave* were illusory ; and therefore the whole was void ; also that if the appointment was bad in part, the whole was void ; for it could not be presumed, that if the testator had known, that certain parts could not be executed, he would have said, the subject of such parts should go to others, or that he would in that case have had the rest executed.

1794.
BRISTOW
v.
WARDE.

Mr. Mansfield, Mr. Lloyd, Mr. Richards, and Mr. Hollist, for the widow and children of *Henry Bristow* ; and *Mr. Romilly* for *Mr. Hobart* :

[345]

This is a general power under the articles. In all marriage articles the object is to provide for the wife and issue : but it is impossible to say, this is a power to appoint to children, when by the same articles in case of no disposition it is to go to the children. * * * The plaintiffs cannot say, it was well executed in part and ill-executed in part ; for claiming interests under the will they cannot dispute any disposition by it.

Attorney-General, in reply :

The same principle, upon which, where there is an appointment with a condition, and the condition is bad, the appointment is good, repels the doctrine of election. If an express condition would be bad, an implied condition, the foundation of election, must be bad. This limitation must be intended to comprehend all the grandchildren : but real and personal estate must be limited to persons, who must necessarily take within lives in being and twenty-one years. * * *

LORD CHANCELLOR :

[347]

The only difficulty in this cause is that, which surrounds the Court in all cases, where a parent has with tenderness, wisdom, and discretion, made a distribution of his fortune according to the circumstances of his family at the time ; but has done more in the mode of doing that, than the strict construction of a power allowed him. The Court necessarily feels great inclination to

1794.
BRISTOW
v.
WARDE.

support what appears upon the whole very desirable. I have given all the attention I could, to this case, to see, if by any favourable construction I can consistently with the course of the cases and the rules find means of substantiating to any extent the disposition made. The first consideration is, what is the construction of the articles. I was at first struck with the idea, that was urged, that the extent of the articles gave him a larger power, than the settlement afterwards made purporting to be in pursuance of the articles had left him. But it is clear upon the articles, he had no more power under them, than what he took to himself under the settlement executed with regard to the bulk of the money. The articles were made in order to secure a provision for the intended wife and the issue of the marriage. That is the object of all marriage articles; particularly here, where equal sums were brought in by both parties to be settled for the family: but it was contended, that the power here is indefinite as to its objects. It would be a forced construction of articles to hold, that a provision to be made for children, in default of appointment to be equally distributable, in the case of an appointment should be subject to his debts; which would be the necessary consequence of holding, that he had an indefinite power of appointing, only providing for the jointure of the wife; for if he had that indefinite power, it would be assets; he might appoint to anyone; his creditors could affect it; and if he executed his power for the children, the children must take it subject to the debts of their father. It is not the natural frame of such a settlement, nor is it the construction of the words of this. It is clear, the power of appointment is not indefinite; but is confined to the issue.

[348] Then it is contended, that the word "issue" has a larger extent than the word "children" in the settlement. It may be so in many cases. Grandchildren are issue; and the Court would often let them in; but it is impossible here; for the issue here is strictly defined. They are to take at twenty-one; and an application of the produce is directed for maintenance and education before that age; and the survivor attaining that age was entitled to the whole fund; and those dying before it were not to have any. Therefore children were necessarily intended.

Besides in the execution of their intention the parties expressed the sense, in which they understood it, by framing the settlement to the children subject to a power of appointing among the children. Therefore I am unable to extend the construction of either the settlement or the articles beyond the children; and whatever inclination the Court has shewn in other cases, it is not now to be argued, that such a limitation with a power to appoint to children can extend to grandchildren. The cases quoted, which were fully discussed, have fixed that; and as to all that part to be laid out in land (which is material here) there is a technical rule, that makes it impossible in the limitations of real estate under a power to carry them beyond the first degree; because it would carry it beyond the legal limits of lives in being and twenty-one years after. If therefore children are the limits, within which this must be confined, so much of the will, as goes beyond these objects, to whom he was enabled to give any share, cannot take effect.

As to the consequence of his executing the power, by which as to certain parts he has embraced objects not within the power, if I could find means of effectuating the general purport, though not in the mode, he has adopted, of extending in another way the benefit of the appointment to the grandchildren, it would be desirable in this case. The case is unfortunate as to the eldest son. It is probable, that out of regard to the eldest son and his issue he made this disposition: but that intention must totally fail, unless by construction I can raise an estate tail in the son. The idea struck me at first: but it is impracticable. This differs materially from *Pitt v. Jackson*. Without entering into a discussion of that case and the objections made by the Attorney-General to Lord KENYON's decree, and supposing it to stand as a clear authority, it would not enable me to do the same thing *here; for there the limitation of the will was to Mary Smith for life: remainder in tail to her children as purchasers; she being entitled under that settlement to a vested estate tail subject to be divested by the appointment. Therefore there was not that difficulty, which is in the present case, in construing, that he reduced her interest, that her children might take estates tail by purchase; and that that might be executed *cy pres* by letting

1794.
BRISTOW
v.
WARDE.

[*349]

1794.
BRISTOW
v.
WARDE.

the estate tail, she had, exist, so as to carry over the benefit to her children. Here it is a power to Henry to appoint to children in such shares, as he thinks fit. No estate tail is given; nor is any intention of that sort expressed: but the children would take either by the appointment, or for want of it distributively *per capita*. Therefore that does not apply; and I am under the necessity of saying, the interests to the children of Henry cannot in any respect take effect either as to the land or the money.

It was argued, that the appointments to Mrs. Hobart and Mrs. Neave giving them nothing immediately, but only contingent interests for life, are illusory; and therefore the whole is bad. It would be a very hard construction to hold, that by the part of the execution of his power, which was directed towards them, he meant to illude, and make a gift, that is in fact no gift; because in the manner, he conceived it, not doubting his power he gave an estate to the husband of each for life; remainder to them, if they should survive their husbands. If he had given to the wife for life, and in case the husband should survive, to the husband, that would have been a substantial gift to the wife; for it is admitted, a gift for life is sufficient. He has done the same thing; for the husband would in that case, in point of law, have taken during the life of the wife. The insertion of the name of the husband prior to that of the wife is doing no more, than if he had given to the wife first. The intention therefore not being to illude, but to give in effect such estate, as a married woman could take, viz. for the benefit of the husband as long as the coverture should continue, it is not illusory. But, independent of that, the answer of the Attorney-General is full and unanswerable; that the Court will not set it aside as illusory, where the ground is that stated in the testator's will. He having power to appoint provided these children upon marriage with what he thought an adequate settlement, considering them as provided for, and therefore *not within the true meaning children to be provided for out of his power. Therefore there is no defect in the appointment to vitiate the whole.

[*350]

The next question is, Whether the whole being defective as to part should be totally set aside, and the fund be distributed as in

default of appointment. It is contended, that if it cannot take effect in the manner, the distribution was made by the testator's father, the question will be, what he would have done, if he had been apprised, that part failing, there would arise an inequality unforeseen by him as to his children. The answer is, nobody can tell what he would have done: but that is not a ground for setting aside the whole; for each child, to whom he has well appointed, has a right to claim that: for instance John Bristow, who has 2,000*l*. The Court has no right to take that away. There is no reason to say to them "you shall not take this, because the intention as to the rest cannot take effect." There is no ground to rescind the gifts to them of their parts. I asked, whether there was any case, where the whole was set loose, and distributed, as if no appointment had been made, because part of the appointment was bad. That proposition therefore is untenable, that in case of a flaw in the execution as to part, the whole must be void. All that is well appointed, will stand.

1794.
BRISTOW
v.
WARDE.

The consequence is, the remainder must be divided as in default of appointment; unless it will hold, as argued, and I do not know how to state it as to this case, that a person to whom a specific share is appointed, shall be excluded from taking any of the unappointed share, because it is clear, the father meant, he should have no more, than what was particularly given. The doctrine of election cannot apply, where there is no other subject but that to be appointed. It never can be applied, but where, if an election is made contrary to the will, the interest, that would pass by the will, can be laid hold of to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that, which he had power to distribute.

The consequence of this opinion is, that the legacy fund, which is personal, ought to be distributed equally among the *children living at the death of John Bristow; and must be paid to them, or the legal representatives of such, as are dead; and that the 20,797*l*. 4*s*. 7*d*. reduced Bank Annuities must be con-

[*351]

1794.
BRISTOW
v.
WARDE.

sidered as land; and so much thereof, as is declared ill appointed, belongs to the children living at the death of John Bristow as tenants in common in tail with cross remainders.

WILSON v. PIGGOTT.

(2 Vesey Jr. 351—357.)

1794.
June 30,
July 8.
ROLLS
COURT.
ARDEN, M.R.
[351]

4,000*l.* settled on marriage in trust after the decease of the husband and wife to pay among all and every the child and children other than an eldest or only son at such times and in such proportions as he, or she, or the survivor, should appoint by deed or will; for want of appointment, among such child and children, other than, &c. equally to be divided; if but one, to that one; payable at twenty-one or marriage, or as soon after, as the life interest should drop; the shares of any dying before payable in the 4,000*l.* or so much, as should not be appointed, to go to the survivors at the same time: There were four younger children: the marriage settlement of one recited, that she was entitled to 1,000*l.* part of this fund; one-fourth of it was appointed to another on his marriage; and to a third 1,000*l.* as her share of that portion; the fourth died above twenty-one before his father, who survived his wife, and died without any farther appointment; held, that 3,000*l.* was well appointed; and that the remainder vested in all equally according to the direction for want of appointment.

THOMAS HILL on the marriage of his daughter Sarah with Charles Piggott gave his bond to pay within six months after his decease 4,000*l.* to trustees upon trust to lay out that sum on real or parliamentary security; and subject to the payment of 150*l.* per annum to Elizabeth, wife of the obligor, to permit Charles Piggott to receive the proceeds for life; after his death to permit his wife to receive the proceeds for life, and after the decease of the survivor as to the capital and the proceeds from time to time to pay the same among all and every the child and children of Charles Piggott and Sarah Hill, other than an eldest or only son, at such times, and in such proportions, as he, or she, or the survivor, should appoint by deed, or will; and for want of such appointment, among such child and children, other than an eldest or only son, equally to be divided among them, if more than one; if but one such child, then to such child; payable to the daughters at 21 or marriage, and to the sons at 21, if Elizabeth Hill, Charles Piggott, and Sarah Hill, should be then

dead ; if not, then immediately after the decease of the survivor ; and if any such daughter or daughters should die under age, and unmarried, and any such son or sons under age, that the shares of him, her, or them so dying, in the 4,000*l.* or so much thereof, as should not be appointed, should go to the survivors or survivor of them at such times, as his or her original share should become payable ; the proceeds in the mean time to be applied for maintenance and education of all such child or children ; and in case of an only, or only *surviving, son to pay the said 4,000*l.* to such only son at 21 : and to apply the proceeds in the mean time for his benefit ; and in case of no issue, or the death of all such before the 4,000*l.* should be payable, in trust for the survivor of Charles Piggott and Sarah Hill, his or her executors and administrators.

1794.
WILSON
P. PIGGOTT

[*352]

There were four younger children ; Sarah, Elizabeth, Thomas and Charles. By the marriage settlement of Sarah, dated the 11th of February, 1774, it was recited, that whereas she was entitled to the sum of 1,000*l.* part of the sum of 4,000*l.* payable at the death of Charles Piggott, and also to the sum of 500*l.* both which would belong to her intended husband, and whereas Charles Piggott had agreed to secure an additional portion, in consideration thereof, &c. the marriage settlement proceeded : but no appointment was ever executed in favour of Sarah.

Upon the marriage of Elizabeth 20th July, 1775, her father by virtue of the power under his marriage settlement appointed, that 1,000*l.* part of the said 4,000*l.* should be raised and paid for the benefit of Elizabeth within six months after his decease with interest from his decease as her share of the portion provided for the younger children under that settlement.

Upon the marriage of Thomas his father appointed, that the trustees and the survivor, his executors, &c. should immediately after his decease pay to Thomas Piggott, one-fourth part of the said 4,000*l.* ; which fourth part was agreed to be settled upon the marriage of Thomas.

Charles Piggott, the younger, having attained 21, died in the life of his father ; who died without making any farther appointment, having survived his wife and her mother.

The bill was brought by the surviving executor of Thomas

1794.
WILSON
v.
PIGGOTT.

Hill to have the rights of the parties ascertained; and upon payment to have the bond delivered up.

[The questions now material were, whether the recital in the marriage settlement of Sarah should operate as an appointment: and how the residue should be disposed of; and if among all, whether under the terms of the appointment to Elizabeth, she would be excluded.]

[353]

Mr. Grant, Mr. Stratford, and Mr. Abbot, for Thomas Piggott and his children: cited Maddison v. Andrew, 1 Ves. Sen. 57.

* * In *Bristow v. Warde** it was held, that there must be an equal division among all the children of what was ill appointed. There is no appointment to Sarah. The others are specific appointments. Where any specific form is prescribed, it must be pursued. The words, "as her share" will exclude Elizabeth from the residue. * * *

Mr. Cox, for Elizabeth:

It is difficult to account for those particular words in her case without allowing, that it was apprehended, she might become entitled to a share of what was not appointed: but no child could be excluded from a share of that except by an appointment.

Mr. Lloyd for Sarah contended, that there was a good appointment to her; and upon the other points agreed with the counsel for Thomas.

Mr. Graham and Mr. Scafe, for the administratrix of Charles:

* * * The recital in the settlement of Sarah is undoubtedly an appointment. He says, she is entitled; that is all, that is necessary in execution of a power.

MASTER OF THE ROLLS (after deciding a point not here reported, continued as follows): * * *

The next question is, Whether the recital in the settlement of Sarah can be considered as a declaration, that she should have

* *Ante*, 235.

1,000*l.* part of this sum. It is contended for Thomas and Elizabeth, that this is no positive appointment; that her father never declared, she should have that sum; and never expressed such a purpose in the form, which might be expected from a person executing a power: but it is clear, where a party has such a power, and lays himself under an obligation, or demonstrates an intention, to give a share to any child the Court will enforce it without attention to the mode, in which it is given. In this settlement he declares her entitled to this sum, to which she could only be entitled by his appointment; and the husband makes a settlement in consideration of it. He could have compelled the father to execute a regular appointment. It is a covenant by the father; and *Coventry v. Coventry* and the cases of supplying a surrender in favour of any one child prove, that a child shall avail itself of the intention, whatever is the mode, in which it is signified. Therefore that clause in the settlement of Sarah is an appointment to her. * * *

1794.
WILSON
v.
PIGGOTT.
[355]

Upon the other point here reported the MASTER OF THE ROLLS observed:

[356]

* * As to Elizabeth, he has not in express words said, the part appointed to her is to be taken in lieu of her shares; but "as her share." That goes only to this; that at that time he had not determined, that her share should go beyond 1,000*l.* but it is not carried to this extent, that under all circumstances and in all events he meant to divest himself of the power of giving her any more. Then all I can collect is, that he thought 1,000*l.* sufficient for each of those three; and meant to reserve 1,000*l.* This power is exactly the same as that in *Bristow v. Warde*. Neither contains a direction as to so much, as shall not be appointed. From that case I conclude what I always thought; that if there is a partial execution as to any, what remains is to be divided, as the whole would have been, if no appointment had been made. Fortified by that case I have very little difficulty in deciding this. *Maddison v. Andrew* decided all the principles, upon which it must be determined.

ROUTLEDGE v. DORRIL.†

(2 Vesey Jr. 357—367.)

1794.

July 17.

ROLLS
COURT.

ARDEN, M.R.

[357]

Personal estate settled on marriage for the husband for life, then for the wife for life, then to and among all and every the children and grandchildren, or issue, in such shares, under such restrictions, at such times, and in such manner, as they or the survivor should appoint by deed or deeds or by will; for want of appointment to all and every the children and grandchildren, or issue, living at the decease of the survivor, equally, payable at twenty-one or marriage; if but one, to that one; provided that in case of no appointment the issue of any children dead should not have a greater share than their parents would have had: issue only are within the power; but in any degree: but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power; otherwise it is void, even as to such as come *in esse* within those limits: but on marriage of a daughter interests may be given to her children, generally, and to the husband. What is ill appointed goes as in default of appointment: but children of a living parent cannot take under the proviso.

The doctrine of *cy pres* does not apply to personal estate; therefore where under a power to appoint personal estate to children or issue an appointment is made to a son for life, then among all his children, if none, to him his executors, &c. the limitation to his children being void, because not restrained within the legal bounds, cannot be made good *cy pres*.

Preceding limitations under an appointment being void, subsequent limitations, though within the power cannot be accelerated; and are void also; though the objects of the prior limitations never come *in esse*.

An unborn child of a person *in esse* may be made tenant for life.

On the marriage of Richard Dorril and Elizabeth Harcourt, one moiety of the manor of Nutting Barnes and other premises at Kensington, and one moiety of 2,150*l.* Old South Sea Annuities were conveyed and assigned on trust to be sold; and that the produce with 5,500*l.* Bank Annuities transferred by Richard Dorril to the same trustees should be possessed by them on trust as to the Bank Annuities for the husband for life; after his decease for the wife for life; and after the decease of the survivor, if there should be any issue of the marriage, to pay, divide, and distribute, assign, or transfer, the said trust premises, or the *securities, unto and among all and every the children, and grandchildren, or issue, of the said intended marriage, if there should be more than one, in such shares and proportions,

[*356]

† *Williamson v. Farwell* (1887), 35 Ch. D. 128.

1794.
 ROUTLEDGE
 v.
 DORRIL.

and under such restrictions, limitations, and conditions, and at such time and times, and in such manner and form, as Richard and Elizabeth Dorril, by any deed or deeds, writing or writings, to be by them duly executed in presence of two or more credible witnesses should from time to time, or at any time or times during their joint lives, direct and appoint; and for want of such appointment, unto and among all and every the children, and grandchildren, or issue, of the intended marriage, if more than one, in such shares and proportions, and under such restrictions, limitations, and conditions, and at such time and times, and in such manner and form, as the survivor should from time to time, or at any time or times, by any deed or deeds, writing or writings, executed as aforesaid, or by his or her last will and testament, give, declare, direct, or appoint; and for want of such appointment, for all and every the children, and grandchildren, or issue of the marriage, if more than one, which should be living at the decease of the survivor, equally to be divided among them, share and share alike; payable to the sons at 21; to the daughters at 21 or marriage; provided, that in case of no appointment by Richard and Elizabeth Dorril, or the survivor, the issue of any child or children dead should not have any greater or other share, than the parent or parents of such children or issue, if living, would have been entitled to; and if there should be but one child living at the decease of the survivor, for such only child, with power for maintenance and education of the children or issue of the marriage in case of no appointment; and as to the produce of the said moiety of the manor, &c. and of the moiety of the South Sea Annuities, to lay out the same in some of the public funds, upon the same trusts, for the same purposes, and subject to the same powers, applications, restrictions, and agreements; and in case of no child or issue of the marriage, or the decease of all before time of payment, upon other trusts.

The estates at Kensington were sold; and a moiety of the produce was invested in the purchase of 3,500*l.* 3 per cent. Bank Annuities upon the trusts of the settlement. The 1,075*l.* a moiety of the 2,150*l.* South Sea Annuities was not transferred under the settlement; but remained vested in the original trustees.

1794.
 ROUTLEDGE
 v.
 DORRIL.
 [*359]

*Richard Dorril died in 1762 before any appointment, leaving his widow and four children by her, Richard, Elizabeth, Frances, and Mary, surviving.

In 1775, 300*l.* part of the 5,500*l.* Bank Annuities was at the request of the widow, sold and applied in the advancement and for the use of Frances Dorril.

In 1776 in consideration of the marriage of John Edwards and Elizabeth Dorril the younger, her mother by the marriage settlement, executed according to her power, appointed 500*l.* part of the 3,500*l.* Bank Annuities to her daughter Elizabeth immediately on her marriage, as part of her share in the same, to the intent that her husband might receive the same and the dividends to his own use ; and in consideration of the marriage, and to make some provision for John Edwards and Elizabeth Dorril and their issue, Elizabeth the elder by virtue of her power appointed 1,000*l.* other part of the said 3,500*l.* Bank Annuities to her daughter Elizabeth immediately after the decease of the mother to be transferred to trustees upon trust for John Edwards for life, in case he should survive Elizabeth Dorril the elder ; and after his decease for his wife for life, in case she should survive him ; and after the decease of the survivor for all and every the child and children of the marriage in such shares and proportions, manner and form, upon such conditions, with such restrictions, and at such time and times, as John and Elizabeth Edwards or the survivor should appoint ; in default of appointment, equally, with survivorship ; and if there should be no children, or all should die, before they should be entitled, for the survivor of John and Elizabeth Edwards, his or her executors or administrators.

In 1775 Frances Dorril married Jonathan Twiss.

In 1782 Elizabeth Dorril the elder, by her will reciting her power, and the appointments, she had made, in pursuance of her power appointed, that 1,000*l.* a moiety of the 2,000*l.* remaining of the 3,500*l.* Bank Annuities should upon her decease be transferred to her executors upon trust for Elizabeth Edwards for her separate use for life ; and after her decease to transfer the capital to and among all and every the child and children of Elizabeth Edwards by her then or any future husband in equal

*shares and proportions, if more than one; if but one, to such only child, payable to the sons at 21, to the daughters at 21 or marriage, with survivorship; and in case Elizabeth Edwards should leave no children by her then or any future husband living at her death, or all should die before 21 or marriage, the testatrix appointed the said 1,000*l.* to her son Richard and her daughter Mary Dorril, their executors and administrators, in equal shares. She farther appointed, that 500*l.* part of the 5,200*l.* remaining of the 5,500*l.* Bank Annuities should upon her decease be transferred to her executors upon trust for her daughter Frances Twiss for life for her separate use; and after her decease to transfer the capital to and among all and every the children of Frances Twiss by her then or any future husband in equal shares and proportions, if more than one, if but one, to such only child, payable to the sons at 21, to the daughters at 21 or marriage, with survivorship; and in case she should leave no children by her then or any future husband, or they should die before 21 or marriage, the testatrix appointed the 500*l.* to Jonathan Twiss, his executors and administrators. She farther appointed the 1,000*l.* remaining of the 3,500*l.* Bank Annuities and 1,000*l.* of the 4,700*l.* remaining of the 5,500*l.* Bank Annuities upon her decease to Mary Dorril for life for her separate use; and after her decease to and among all and every her children by any husband in equal shares and proportions, if more than one, if but one, to such only child, payable to the sons at 21, to the daughters at 21 or marriage, with survivorship; and in case she should leave no children, or they should die before 21 or marriage, to Richard Dorril, his executors and administrators.

The testatrix farther appointed the 3,700*l.* remaining of the 5,500*l.* Bank Annuities and the 1,075*l.* South Sea Annuities upon her decease to Richard Dorril for life, but with full power in case of his marriage to make a settlement of the said stock or any part of it upon his wife, and the issue of such marriage: and after his decease in case of no settlement, or as to such part, as should not be settled, to and among all and every the child and children of Richard Dorril in equal shares and proportions, if more than one, if but one, to such only child, at such ages and times, and with the same benefit of survivorship, as were men-

1794.
ROUTLEDGE
v.
DORRIL.
[*360]

1794.
ROUTLEDGE
v.
DORRIL.
[*361]

tioned with respect to the children of the testatrix's daughters : but in case Richard Dorril should leave no children at his death, or all *should die, before they should be entitled, to Richard Dorril, his executors and administrators.

The testatrix died in 1791 leaving all her children surviving, and three children of Mrs. Edwards her only grandchildren.

The bill was brought by the executors to have the usual accounts taken, and the rights of the parties in these trust funds ascertained.

The general question was as to the validity of these appointments ; out of which several points arose : first, if the interests given to grandchildren were void as to those not living at the death of the testatrix, whether those then living could take ; and whether the appointment to Richard and his children could be executed upon the doctrine of *cy pres* : secondly, whether the preceding interests being void, the subsequent limitations to the children, who were good objects of appointment, could be accelerated : thirdly, how what was ill appointed should be disposed of ; if as in default of appointment ; fourthly, whether the children of Mrs. Edwards could claim under the proviso, that in case of no appointment the issue of any child deceased should not have a greater share, than the parent would have taken.

MASTER OF THE ROLLS :

This cause has stood a considerable time for judgment ; the parties having thought fit to request, that instead of making a case for a Court of law, which I think would have been the proper mode, and which I am very sorry I did not adopt, it might be determined here ; and thinking, that as it was a family affair, it might be decided with less expense, and in a more summary way, they have pressed, that I would in consequence of the certificate in *Griffith v. Harrison*, in which the Court of King's Bench was divided, give my opinion upon it without referring it to a Court of law. I have found more difficulty, than I apprehend had occurred either to the parties or the Counsel ; and it has been so perplexed in the manner, in which it was brought forward, by a confusion of separate and clashing interests, that this case has not been argued, as a case involving

such a number of questions might have been expected to have been argued. *It seems to me to be a case, that involves almost all the questions, that have for a long time agitated the Courts as to executions of powers both at law and in equity. There is no doubt, that under this power it was competent to the parties to have appointed among all the issue living at the death of either the husband, or wife, whether the first, second, or third, degree; and though the words are not confined to grandchildren living at the death, yet as they might appoint to such, as were then living, such appointment would be good. The first question is, whether the appointment made on the marriage of Elizabeth Dorril the daughter is good within the power and the rules of law, being an appointment in consideration of the intended marriage of the daughter of a certain portion of that, of which the daughter might have been made the appointee; but settling that so as to give interests to persons, who would not have been objects of a direct appointment; but I am of opinion, that wherever there is a power to appoint among persons capable of such appointment, and they come *in esse* at the particular times to make the appointment good, a sum appointed, as in this case to the daughter, upon marriage, though modified with respect to the objects of the marriage, is a good appointment, not to the objects of the marriage, but to the daughter herself; and this appointment is a good appointment to her; though if it had been done by will, and independent of any modification introduced by Elizabeth the daughter, it would not have been good; because the husband, and the children of the marriage born after the death of their grandmother, were not immediate objects of appointment. Therefore it is just as if it was appointed to her, and she had settled it so with the husband. So far there is not much doubt: but upon the subsequent appointments made by the mother there is not only great doubt; but all the doubts, that have ever occurred arise, and I am very sorry now to have to determine it without sending it to law. There is no doubt, that under the words of the original power any issue of the intended marriage living at the death of the husband or wife would have been competent to receive a share; and there being three children of Elizabeth Edwards living at the death of

1794.
ROUTLEDGE
v.
DORRIL.
[*362]

1794.

ROUTLEDGE

v.

DORRIL.

[*362]

Elizabeth Dorril, if she had appointed to them, without doubt they might have taken. But she has appointed to Mrs. Edwards for life; and instead of giving it to such of her children, as should be living at the death of their grandmother, she has given to all the children, her daughter might have during her life. Those that may be born after the death of their grandmother, cannot be included among those, in whose *favour the power may be executed; and the question is, whether those children, who might have been the proper objects, shall take. At first I was of opinion, that as she might have appointed to the three children born before her death, when she appointed to all, these three might be considered as the sole objects: but upon considering it farther, and particularly upon *Jee v. Audley*,† I am of opinion, that would be a forced construction; and that the grandmother in affecting to give this to all the issue her daughter might have at any time, has transgressed the power; and so far being ill executed it is to be considered as not executed, and is totally void.

The appointment to Mrs. Twiss and her children, and for want of children to her husband, falls into the same predicament. She affects to give part of this, which must be confined to the children living at her death, to all the children, her daughter may ever have.

As to the appointment to Mary Dorril and her children, from what I have said it is clear, the children of Mary being children unborn at the death of their grandmother, it is void as to them: but if there are no children, it is given over to Richard Dorril; and he, if it was given immediately to him, would have been entitled to receive it; and then the question in *Alexander v. Alexander*, 2 Ves. Sen. 640, and *Robinson v. Hardcastle*, 2 Term Rep. B. R. 241, arises; whether, the intermediate appointment being bad, the subsequent appointment shall be accelerated. I agree with *Sir Thomas Clarke* and Mr. Justice BULLER, that though the children substituted immediately after the first gift for life are incapable of taking, they will prevent it from going over; and that it would be monstrous to contend, that though it is appointed to Richard Dorril in failure of the existence of persons incapable of taking, yet notwithstanding they exist, he should

† 1 R. R. 46.

take, as if it was well appointed to them, and they had failed. It is given upon a contingency, upon which there was no right to give it. It has been asked, if there are no children, why should he not take it? I think Lord KENYON is right in *Jee v. Audley*. The bill was dismissed; and in the Registrar's book there is no statement of the case: but I have been furnished with a note of it by Mr. Cox. One question was, whether the Court would wait to see, what contingency would happen, when at the time it was given at a period more distant, than the law would permit. I agree with Lord *KENYON, that it is absolutely void in that case; and every affectation of giving it over upon that contingency is equally void.

There is no doubt as to the appointment of 800*l.* to her daughter Frances.

As to the appointment to Richard Dorril the son for his life, there is no doubt as to that; but as to the subsequent appointment of the fund, when it is clear, that it was intended to go to his children, but if there should be no children, then to himself, and he being capable of taking the whole immediately, though his children cannot take, I must feel great reluctance in declaring, that all this disposition in favour of Richard Dorril after his life interest is void: but I am under the necessity of so doing. It is contended, and that is the great difficulty, that if the children cannot take, upon the doctrine of *Pitt v. Jackson*, the intention is to be executed *cy pres*; and if it cannot be executed in the manner, in which the party has endeavoured to do it, the Court will substitute some other mode, by which it may take effect. I know, the doctrine in that case has by very great authorities been questioned. Lord KENYON allowed it there; and in a similar case *Griffith v. Harrison* he has adhered to it, and was followed by Mr. Justice GROSE. The other Judges did not negative that; but thought, an estate for life only passed for other reasons. In *Bristow v. Warde*,† the LORD CHANCELLOR avoided giving any opinion upon that. I subscribe to the case of *Pitt v. Jackson* as far as it was decided with regard to a real estate settled to a person, who was an object of the power, for life, with limitations in strict settlement to persons not objects of

1794.

ROUTLEDGE
v.
DORRIL.

[*364]

† *Ante*, p. 235.

1794.
ROUTLEDGE
v.
DORRIL.

[*365]

the power : for that was decided in *Humberston v. Humberston*, 1 P. Will. 832, and *Spencer v. Duke of Marlborough*, 5 Bro. P. C. 592, but I cannot apply that to personal property. *Pitt v. Jackson*, was a case of real estate. The first and other sons were incapable of taking as purchasers : Lord KENYON thought, that as it was perfectly clear, it was intended to go to the daughter and her issue, and they could not take as purchasers, to effectuate the general intention of the testator it should be so moulded : and he relied upon *Chapman v. Brown*, 3 Burr. 1626, I admit, and I remember attending the argument of that case in the Court of King's Bench, and in the House of Lords, that it was not decided in the latter upon that point. Lord PARKER took advantage of the omission of a line. They did seem to avoid giving an opinion upon that point. But it is equally clear according to the report, that Lord MANSFIELD laid down that doctrine, and I do not find much objection to it, viz. that where there is a limitation for life to a person unborn with *remainders in tail to the first and other sons, as they cannot take as purchasers, but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate tail in the person, to whom it is given for life. This is personal estate, first given for life to the parent, an object of the power, then equally, or as he shall appoint, to the children, who are not objects of the power. I am desired to execute that *cy pres*. How can I do that ? To effectuate such intention I can only give it to him absolutely ; and then it would not go in a course of descent ; but would go to his executors, and be liable to his debts. In the case of real estate it is true, the law enables the party to defeat the estate tail : but an act must be done by him for that. If he dies without doing that act, the estate goes to his issue. But that is not the case as to personal estate. If I declare him entitled absolutely, his children would not succeed in any manner intended by his mother : but it would go to his his executor. Therefore this doctrine cannot apply to such a subject. Then the issue of these several tenants for life are incapable of taking except the issue of Mrs. Edwards, who cannot take except under the marriage settlement ; because by the will Elizabeth Dorril has given to all generally, not to those, who

should be alive at her death ; and if *Jee v. Audley*† is right, I cannot give it to them in any limited way. That case was on the 14th February, 1787. There was an appointment by will of 1,000*l.* in default of issue of Mary Hall equally to be divided between the daughters then living of John Jee and Elizabeth his wife ; and if that had been restrained to the death of the person executing the power, it would have been good. The bill was brought by the four daughters of John and Elizabeth Jee to have the fund secured for their benefit upon the death of Mary Hall without issue. It was contended, that it was too remote. Lord KENYON said, that neither real nor personal can be so settled as to be tied up beyond lives in being and twenty-one years and a few months afterwards ; that if the expression in that will had been “ daughters now living,” or “ living at my death,” it would have been good : but that as it stood, it might be to those born afterwards ; which was settled by *Ellison v. Airey* ; *therefore it was bad, because intended to take in after-born children. Applying that to the present case, if that is right, and I think it is, it decides this. This testatrix had power to appoint among grand-children or the issue of grand-children ; but provided they were living at her death ; for otherwise it would be tying it up beyond the limits. She has given estates for life to her different children ; and after their deaths the principal, not to those born during her life, of which there were none, but the children of Mrs. Edwards, but to all. Then it is said, if all Mrs. Edwards's children cannot take, why may not those, to whom she might have appointed ? I answer, because she did not mean those only, but all ; and upon failure of all, then, and then only, she gave it over. Therefore upon the whole on the principles, I have laid down, I am of opinion first, that the settlement upon the marriage of Elizabeth is good as an appointment to her ; next, that every gift to the issue of any of the children not living at the death of the testatrix is void ; but that it is sufficient to prevent the gift over to the objects of the appointment, to whom it is given in failure of them. Therefore the children can only take for life under the appointment ; and then the remainder is to be divided, as if no appointment had been made.

1794.

 ROUTLEDGE
 &
 DORRIL.

[*366]

† 1 R. R. 46.

1794.
ROUTLEDGE
v.
DORRIL.

Then comes a very extraordinary case upon the proviso, that in case of no appointment the issue of any child shall have only the share of its parent. There are three children of a living parent. Being born in the life of their grandmother they are objects of the appointment; and might have had shares appointed to them: but not being made objects of it, if their mother had been dead, they would have taken her share. But as she is alive, it is impossible to hold, that a child having a living parent can take any share; though it is clear, they might have been made substantive objects of the appointment. Therefore I declare the appointment, so far as it is executed in favour of any of the issue of the marriage not living at the death of Elizabeth Dorril the survivor, is void; and such parts of the fund remain undisposed of; and are to be distributed. The consequence is, they will go equally among the surviving children, Mrs. Edwards, her brother and two sisters.

[*367]

A question might arise, how far an unborn child is to be made tenant for life: but it is established upon good principles in precedent certainly, that that may be. The doubt was, whether it was not tying up the estate beyond lives in being and twenty-one *years afterwards: but that is not so, where the absolute interest is disposed of, and vested, though part is given for life; for that person with the person having the absolute interest may dispose of the estate. It is not unalienable.

1794.
July 26.
Rolls Court.
ARDEN, M.R.
[367]

WHISTLER v. WEBSTER.†

(2 Vesey Jr. 367—372.)

Testator appoints to grand-children under a power to appoint to children a fund, to go in default of appointment equally: the appointment being bad, the children, having legacies, must elect.

By indentures 13th August, 1784, John Whistler out of the love and affection, which he bore Elizabeth his wife, and to make a suitable provision for her, in case she should survive, and for other considerations, assigned and transferred to Lady Martha

† *Re Brooksbank* (1886) 34 Ch. D. 160; 56 L. J. Ch. 82.

Webster, her executors, &c., certain leasehold premises and monies upon trust to raise 3,000*l.* and to invest that sum in government or real securities, and from time to time to pay the produce to John Whistler for life; after his decease to his wife for life; and after her decease to pay the principal, or transfer the securities, to and among all and every or such of the children of the said John Whistler in such shares and proportions, and at such times, and subject to such conditions, as he should by his last will and testament appoint; for default of such appointment, to and among all and every the children of John Whistler by Elizabeth, equally to be divided between them share and share alike, as tenants in common and not as joint-tenants.

The fund having been laid out as directed, John Whistler by his will gave to his son John 1,000*l.*; to his son Hugh 4,000*l.*; and reciting that he was bound for his son Webster Whistler in 300*l.* he gave him 100*l.* more, if there should be sufficient effects after paying the other legacies before and after mentioned. He gave his daughter Mary Reeves 500*l.*; and his daughter Jane Whistler 1,000*l.*; but directed, that she should be excluded from it, if she should attempt to marry without leave of her mother or guardians. The will then proceeded thus: "I also give to my grand-daughter Elizabeth Reeves the sum of 1,000*l.* of lawful money of England, to be paid her after my wife's decease, out of a deed of trust. In case my said grand-daughter die before *my wife, I give and bequeath the said sum of 1,000*l.* after my wife's decease to my youngest daughter Jane Whistler. I also give and bequeath to the children of my eldest son John Whistler 900*l.* of lawful money of England, to be equally divided among them after my wife's decease, out of the deed of trust aforesaid. I also give and bequeath to my grandson Emanuel Reeves 500*l.* of lawful money of England, to be paid after my wife's decease, out of the deed aforesaid. I also give and bequeath to the rest of the children of my daughter Mary Reeves except Elizabeth, to whom I have already bequeathed 1,000*l.*, 600*l.* of lawful money of England, to be equally divided among them after my wife's decease, out of the aforesaid deed of trust. Also if my grandson Emanuel should happen to die before my wife, my will is that

1794.

WHISTLER
v.
WEBSTER.

[*368]

1794.
WHISTLER
"r."
WEBSTER.

the 500*l.* left him shall after my wife's decease be equally shared among all the children of my daughter Mary Reeves aforesaid except Elizabeth, for whom I have already provided : those children to be brought up in the Church of England to be excluded all benefit of these legacies."

The testator then gave his wife all his goods and chattels ; and all the overplus of his property and effects he gave equally to be divided between his son Hugh and his daughter Jane ; and made Lady Webster and his wife executors and guardians.

The testator died in 1786 leaving all the children mentioned in his will surviving. They were the only children living at the execution of the indentures of 1784. John Whistler, jun., died before his mother ; who died in 1793.

Jane Whistler married John Baxter ; and they, with Hugh and Webster Whistler, brought the bill charging, that the appointment was bad, and that the 3,000*l.* became upon the death of Elizabeth Whistler divisible between the surviving children and the representatives of John.

The appointment to the grandchildren being clearly bad, the only question was, whether the children must elect to take under the settlement or the will.

[369]

Mr. Graham and *Mr. Cox*, for the plaintiffs :

This is a new question. In none of the cases upon executions of powers was the question of election started until *Smith v. Lord Camelford*.† This is different from the common cases of election ; for the effect of the deed of 1784 is to give the children a vested and indefeasible interest in certain shares of this fund ; and the father retained only the power of saying, what the shares should be. The grand-children cannot be said to take under this will ; for the power did not extend to them. * * * *Cull v. Showell*, Amb. 727 ; 3 Wooddes. Append. 1, is very strong against the election.

Mr. Lloyd and *Mr. Campbell*, for the defendants :

It does not appear, upon what ground *Cull v. Showell* was determined. There must be some inaccuracy in it ; for it refers

† That cause stood for argument before the Lord Chancellor upon the question of election.

to *Hearl v. Greenbank*,† where the reason, the heir was not put to election, was, that the will having only two witnesses was no will as to land. The foundation of all the cases of election is what is said by Lord TALBOT in *Streatfield v. Streatfield*, For. 176, that when a man takes upon himself to devise what he had no power over upon the supposition, that his will will be acquiesced in, this Court compels a devisee to take entirely, not partially under it, as in *Noys v. Mordaunt*; † there being a tacit condition annexed to all devises of this nature, that the devisee does not disturb the disposition of the devisor. Then how is it material, what the instrument is? If it *is an appointment as to the 3,000*l.*, yet it is a will as to his own property. [They cited several old cases of election.]

1794.
WHISTLER
v.
WEBSTER.

[*370]

Reply :

The cases of election are, where the testator assumes an arbitrary power, which he has not, and the Court sees, that the whole arrangement of the will must be disappointed by the claim : whence the Court draws the inference, that such could not be the intention. It does not follow, that if this testator had known, he could not give to his grand-children, he would have said, his children should not take ; and have recalled the benefit, he had given them a short time before. From the loose expressions he uses, it is clear he had not the deed before him.

MASTER OF THE ROLLS :

When this cause was opened, I had no doubt : but *Cull v. Showell* was mentioned. If I had any doubt, I should be glad to have the great authority of the LORD CHANCELLOR to determine the doubtful opinion I might entertain : § but in a case in which I have no doubt whatsoever, it is my duty to pronounce my opinion.

The question is very short ; whether the doctrine laid down in *Noys v. Mordaunt* and *Streatfield v. Streatfield* has established this broad principle ; that no man shall claim any benefit under a

† 3 Atk. 695 ; 1 Ves. Sen. 298.

‡ 2 Vern. 581.

§ It had been suggested at the

bar, that the cause should stand over until the determination of *Smith v. Lord Camelford*.

1794.
WHISTLER
v.
WEBSTER.

[*371]

will without conforming, as far as he is able, and giving effect, to every thing contained in it, whereby any disposition is made shewing an intention, that such a thing shall take place; without reference to the circumstance, whether the testator had any knowledge of the extent of his power, or not. Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough for me to say, he had such intention; and I will not speculate upon what he would have intended in different cases put. There is an error in *Cull v. Showell*, if it was determined upon the point, *which seems according to both the books, from which it is cited, to have been argued, and acquiesced in by the Court. It is endeavoured to say, the parties do not take under the will: they did not in any one case. In *Streatfield v. Streatfield* there was a legal estate: the devisor thought, he had given himself the complete interest to dispose of: but it turned out, that he was a mere trustee; that he had given himself no estate, he could devise. It might be said there, as here, if he had known that, he would not have made that disposition. I am obliged to say, *Cull v. Showell* is erroneous, if founded upon the argument first argued: but there is another point in that case very material, viz. the length of time. It was impossible then to tell, of what the personal estate consisted; and no person can be put to elect without a clear knowledge of both funds. I rather imagine, the LORD CHANCELLOR went with the counsel in both arguments: but I am willing to believe, the latter was the ground: and that is sufficient to bear him out. The argument of *Mr. Wooddeson* is very ingenious, as far as he endeavours to distinguish that case from *Streatfield v. Streatfield* and the other cases of election. The circumstance of the legal estate and the other cases, he puts, of tenant in tail neglecting to suffer a recovery, and of copyhold devised without surrender, make no difference. The devisor had the power, if he had used the proper means. *Non constat*, that General Pulteney would have made that disposition, if he had known his situation. The distinction between *Hearl v. Greenbank* and these cases is, that where a testator affects to give real estate by will, it cannot be read, nor his will collected from it either in Courts of law or equity, unless there are three wit-

nesses ; otherwise it does not speak as to his land : but if there is an express condition, that would do ; as in *Boughton v. Boughton*. In *Hearl v. Greenbank* capacity both in the instrument and in the person giving was wanting. I have no difficulty in saying, I cannot distinguish this from *Streatfield v. Streatfield* and *Lord Darlington v. Pulteney*. If the instrument is such as to indicate what the intention was, the only question I will ask, is, did he intend the property to go in such a manner ? I will not ask whether he had power to do so ; and whether he would have done it if he had known, he could not without a condition imposed upon another person. Whether he thought he had the right, or knowing the extent of his authority intended by an arbitrary exertion of power to exceed it, no person taking under the will *shall disappoint it. If a testator disposes of the estate of A. to whom he gives some interest by his will, A. shall not take that, unless he gives up his estate to that amount.

1794.
WHISTLER
v.
WEBSTER.

[*372]

There is no difficulty of arrangement. No one claiming a legacy under the will shall have any part of this fund to the disappointment of those, to whom it is given by the will. If they will have this fund, I will take away their legacies ; which shall go in compensation, as far as they will.

Therefore let the children elect ; and reserve farther directions.

ATTORNEY-GENERAL v. BOULTBEE.

(2 Vesey Jr. 380—391.)

In administering a charity, though a particular intention fails, the general intention shall be executed *cy pres* ; therefore upon a trust for the vicars of P., provided they should be presented at the recommendation of the trustees, the trustees neglecting to recommend, the Chancellor, the presentation being in the Crown, presented : held, the vicar was entitled to the benefit of the trust. A declaration of uses by the founder of a charity presumed from an entry in an ancient book, purporting to be such declaration, but without signature or date ; the book being kept by the trustees for entering their proceedings, and containing an order by the trustees, dated six years after creation of the trust, that the declaration of the founder be then entered as a direction to the trustees.

1794.
July 14.
Rolls Court.
ARDEN, M.R.
[380]

By indentures of lease and release 9th and 10th March, 1653, Sir Francis Nethersole conveyed a messuage, lately erected by

1794.

ATTORNEY-
GENERAL
v.
BOULTBEE.

him for the habitation of the minister of Polesworth for the time being, with the appurtenances, then in possession of Richard Bell, minister of Polesworth, and several other premises, and the impropriate tithes of Warton, Dorden, and Pooley, and a rent-charge, to John Swinfen, Michael Biddulph, and Thomas Fox, esquires, Samuel Hildersham, Anthony Burgess, William Bedford, and George Cross, ministers of the Gospel; to hold to them their heirs and assigns for ever, upon trust to permit Sir Francis and his assigns during his life to take the rents, issues, and profits; and after his decease that they or the major part of them, or such other persons, or the major part of them, who for the time being should have the freehold and inheritance of the said messuages, lands, and premises, should permit the vicar of Polesworth for the time being for ever, if he should be there settled by the nomination and appointment of Sir Francis in his life, or of the trustees, or major part of them, or such other persons, who for the time being should have the freehold and inheritance, and no other, to dwell in the said messuage so erected, and intended for such minister's habitation, and to enjoy the same without interruption; and upon farther trust, that the trustees, or the major part, or such other persons, &c. should place a sufficient school-master in the edifice afterwards covenanted by Sir Francis to be erected for a school-master's habitation, and from time to time provide a school-master and mistress; and upon farther trust, that they, or the major part, or such other persons, &c. should dispose of the rents, issues and profits, of all the said premises for the maintenance of a school-master and mistress *for ever to teach the children of the parish of Polesworth, the boys to read and write, the girls to read and work, and both to be instructed in the principles of the true Christian religion; and to such other pious and charitable uses, as Sir Francis should by his own experience find to be most conducive to the advancement of the knowledge and practice of the true religion, and most beneficial to the poor of Polesworth, and should declare and appoint by any writing in his life, or by his will; and in default of such declaration upon trust, that the said trustees, or the major part, or such other persons, &c. should yearly dispose of the rents, issues, and profits of the said

[*381]

premises, either for the increase of the maintenance of the vicar of Polesworth for the time being for ever, who should come in, and be there placed as vicar, by the said Sir Francis's approbation in his life, or by their procurement after his decease; and in no case without such procurement; or for the maintenance of the school-master or mistress; or for repairs of the school; or for various other purposes therein directed, or to any other such pious and charitable uses, as should be termed † most expedient, and most likely to be continued in perpetuity, and declared by the said trustees, or the major part of them, in writing under their hands after the decease of Sir Francis; and there was a direction for keeping up the same number of trustees.

The only proof of a declaration of uses by Sir Francis Nethersole, was a book admitted by the trustees to be in their custody, and to have been kept by the trustees for the time being; in which their proceedings were entered. In that book the following entries were contained.

"November 3rd, 1659.—The said trustees of Sir Francis Nethersole for the charitable uses aforesaid, did meet at Polesworth aforesaid in pursuance of their said trust; and ordered, that the declaration of the said Sir Francis Nethersole be likewise now entered *verbatim* as a direction to said trustees in their proceedings."

"Whereas I have by deed, or deeds, conveyed divers messuages, lands, tenements, rents, tithes, and hereditaments, upon my trusty friends John Swinfen, Michael Biddulph, and Thomas Fox, Esquires; Samuel Hildersham, Anthony Burgess, *William Bedford, and George Cross, ministers of the gospel, and their heirs, upon trust, that they should dispose of the rents, issues, and profits thereof, from time to time, as I should by any writing in my lifetime or by my last will declare and appoint; now I do hereby declare and appoint, that the messuage with the appurtenances, wherein Mr. Richard Bell, now minister of Polesworth doth now inhabit and dwell, shall for ever hereafter be for the habitation of the said Richard Bell and his successors lawful ministers of Polesworth Church; and for the increase of the maintenance of him and his successors I do appoint and

1794.
ATTORNEY-
GENERAL
v.
BOULTBEE.

[*382]

† Sic in report. Qu. "deemed."

1794.
 ATTORNEY-
 GENERAL
 v.
 BOULTBEE.

allow all the tithes of Warton, Dorden, and Pooley, mentioned in the said deed or deeds, and one yard-land of land of meadow and pasture with the appurtenances now in the occupation of James Dester," (part of the premises comprised in the conveyance), "provided, that such minister be settled and placed there in such manner, as in the said deed or deeds is appointed and required, and not otherwise." Then there was an appointment of yearly stipends to the school-master and mistress, and 5*l.* per annum to the school of Tamworth, upon condition, that six children of Polesworth and Warton should be freely educated there, to be approved by his trustees, or their heirs, or the major part; then there were directions for keeping the school houses and the dwelling houses of the master and mistress in repair, with the overplus of the rents, issues, and profits, and for putting out apprentices children of the inhabitants of Polesworth at the discretion of the trustees and the minister, subject to some restrictions; and that the trustees should meet annually at Polesworth, when a sermon should be preached before them, for which the minister should have twenty shillings yearly; and after that, "that the said trustees do dispose of all other the profits of the premises to such pious and charitable uses, as they, or the major part, shall think fit; and my desire is, that an account be then given of all things, and fairly written and entered in a book concerning this trust from time to time; the which book, with all the evidences and writings, that are or shall be made concerning the premises, I do appoint shall be safely kept in some convenient place in the minister's house locked up in a chest provided for that purpose, whereon three locks are to be affixed, and three trustees to keep the keys, whereof I do appoint one key to my nephew Biddulph."

[383] To this entry there was neither date nor signature: but the trustees admitted, that they and their predecessors always considered the said declaration as a direction to them for executing the trust; and always executed it accordingly.

Upon the 7th December, 1779, the vicar of Polesworth being very old, the trustees by memorial to the Lord Chancellor (the representation being in the crown) represented the age of the incumbent; and requested, that upon a vacancy his Lordship

would appoint a clergyman recommended by them. Upon 20th October, 1787, the incumbent died; and on the 27th he was buried. Between his death and burial, Dabbs one of the trustees waited upon the Lord Chancellor; and not having an opportunity of seeing his Lordship left a letter informing him of the death of the incumbent, and requesting him to wait a short time for the recommendation of the trustees. No farther step being taken by the trustees for two months, the Lord Chancellor without any recommendation from them issued a Fiat for the presentation of Walter Rose Norton; who was instituted 17th January, 1788, and inducted a few days after. The trustees refusing to admit this vicar to the benefits of the trust, the information was filed at the relation of the vicar.

The defendants by their answer represented, that Hacket one of the trustees being absent from Warwickshire, they deferred calling a meeting till the 22nd December, 1787, thinking it not right to take any step in his absence; and that they did not then make any recommendation, because finding, the relator was presented, they thought it would be in vain. The answer also stated, that since the time, Richard Bell quitted the vicarage, none of the vicars were presented but by the procurement or recommendation of the trustees, except Thomas Baker, who, they believed, was presented without such recommendation; and he was not permitted to reside in the house, or to enjoy the tithes and parcels of land or the rent thereof: but by articles of agreement 1663 reciting, that he became vicar without such recommendation, and thereby was incapable of enjoying those benefits, to settle all disputes about it during the time, he should be vicar, on his releasing all claim under the trust, Biddulph, one of the trustees, out of the respect, he bore him, covenanted to pay him 5*l.* per annum as long as he should continue vicar. The defendants therefore contended, that the relator was not entitled to the benefits intended for the vicars of Polesworth; and representing, that *they were preparing according to their power to apply the fund to other charitable purposes, submitted to dispose thereof, as the Court should direct.

1794.
ATTORNEY-
GENERAL
v.
BOULTBEE.

[*384]

Upon an inquiry directed by the Master of the Rolls as to the dates of the deaths of the vicars, and the recommendations by

1794.
 ATTORNEY-
 GENERAL
 v.
 BOULTBEE.

the trustees, only two could be found. One was in these terms : " We approve of — Shaw as a proper person to be presented to the vicarage of Polesworth ; and humbly hope, your Lordship will present him accordingly." This was signed by the trustees ; and dated 20th January, 1747 ; on which day the preceding incumbent was buried. The other was as follows : " All the trustees, except C. J. being out of the country, do certify, that we do approve — as a proper person to be presented to the vicarage of Polesworth ; and humbly hope, your Lordship will present him accordingly." This was dated 19th October, 1758, on which day the preceding incumbent was buried. These recommendations were accepted.

MASTER OF THE ROLLS :

This case is attended with circumstances so different from any, that have been yet before the Court, that I thought it necessary to take a considerable time, before I should give my opinion ; not expecting to find any case bearing considerable similarity to it ; but to see, whether the principles, upon which charities are administered in this Court which has been done with great liberality to the intention, to carry that as nearly as possible into execution, might not, if applied to this case, decide the decree, that ought under the circumstances to be made.

This conveyance was made at a time, when the church was in a very unsettled state, during the usurpation ; when the regular ministers were often expelled, and others approved by the commissioners of the Parliament put in ; which then very frequently happened. Stress was in the argument laid on that circumstance : but I do not think it very material. That deed was only meant as a relative deed, to make a provision, if he did not alter his intention. He uses the word " settled," which was one of the parliamentary words used in the general power given to dispossess all persons obnoxious to the existing government, and to put in others. It must now be presumed, there was *a declaration of his intention before his death. The original is lost : but a jury would presume it from this evidence of the book ; which, though it bears no date, is very ancient ; and which the trustees conceive to be cotemporary with the constitution of the trust ;

and by which they always regulated their conduct. That entry must now be presumed a declaration. It was insisted, that there is a distinction both in the deed and the declaration between the habitation and the other benefits ; and that it is more positive as to the former. It would be absolute in him as to the habitation, if in the declaration you make a stop at the words "lawful ministers of Polesworth church." You may struggle to say, the proviso affected the latter part, viz. "and for the increase of the maintenance, &c." and not the former. It is not necessary to decide that point, according to the opinion I hold : it would be necessary, if I thought myself not warranted to give what is intended for the ministers to this vicar, though he has not the approbation of the trustees. By the first instrument it is plain, he had left everything to the discretion of his trustees except the habitation of the minister ; and he was to have only such portion of this charitable gift, as the trustees should think fit : but if this declaration, which I think is evidence, and must be considered as the declaration of his intention, is to govern, provided the vicar is entitled to anything, he will be entitled to the tithes and other provisions as well as the house. Then it was insisted, that all the condition, that respected the approbation, procurement, or nomination, of himself or his trustees, could apply only to the vicars or ministers, who came in under the same, or similar circumstances to those, in which they were then placed ; and that though he had that jealousy of the then reigning powers, that he made the consent of his trustees necessary, *non constat*, that he intended any such shackles to be put upon those now entitled to the presentation in happier times ; that it would be a reflection upon the great seal ; and therefore whatever was the case before, circumstances are now changed so, that the condition is totally gone. I by no means agree to that. It is difficult to know, what his private intention was ; and the particular reason, that induced him to think it desirable, that the minister should come in with the approbation of the trustees. I was inclined to believe, he had then the nomination of the vicarage. I do not find that. It is admitted, that now the right of presentation is in the Crown : but one would have supposed, that his jealousy arose from his having it ; and that he meant to

1794.

ATTORNEY-
GENERAL
v.
BOULTREE.

1794.

ATTORNEY-
GENERAL
v.

BOULTBEE.

[*386]

say, *if they would permit his man to come in, he should have it; but if they went on settling and unsettling, then his trustees should consent. I am willing to admit, at least I will not decide otherwise, that if all due diligence was used by the trustees to procure a person to be approved by them, and yet a person was instituted, who wanted the qualification, which he has made the criterion, that person would not be entitled. I know nothing illegal in this. He had a right to give these estates, as he should think fit. He has first marked out a general charitable purpose; then directs this specific application of part, subject to the proviso; and if there is no such approbation of the trustees, then to some other charitable uses. He had a right to say so. I believe, there are other instances of the same sort of condition; and the great seal has never thought it derogatory or improper; for it is stated by the trustees, and I must take it to be true, that in all instances † the recommendation was accepted; and in the two last instances it is actually proved, that the recommendations to Lords Hardwicke and Northington were accepted. There is nothing so unpleasant to a judge as to be left without any guide merely to say, whether under all the circumstances proper diligence was used by the trustees to avail themselves of this right. It depends entirely upon the circumstances and facts. One fact, which did not appear at the hearing, because we were not then furnished with the dates, is very material. I desired to know, what had been the practice; which would in a great measure constitute the rule. I thought, it would be strange to say, the trustees might wait, and make the recommendation, whenever they pleased; and that the great seal and the intention of the donor were to wait the discretion of the trustees. I could not think that. This Court would not have permitted such conduct in them; therefore I wished to know, whether this Court or any other authority had prescribed any rule. I then desired to know the dates of the deaths of the vicars and the recommendations. The recommendations in 1747 and 1758 were both on the very day the prior incumbent was buried. The latter is

† One presentation was made without their recommendation (see the state of the case): it did not appear

whether the trustees neglected to recommend, or their recommendation was ineffectual.

very material; because the very same circumstance occurred, that has been assigned in this case as the reason of the delay. In these two instances the trustees did so much suppose it incumbent on them to be as quick as possible, *that the very day of the deceased clerk's burial they met, and agreed upon a recommendation. As to the others, there is no account about them. The great seal accepted the recommendation in both those instances. The memorial to the Chancellor in 1779 did not recommend any particular person; but was meant merely as a caution upon their part. I take it for granted, it was delivered; though there is no evidence of it. As to the reason assigned for delaying the meeting till the 22nd of December, there is no proof, when Hacket returned; and they had before them in the book of the proceedings of the trustees a sufficient ground for making the recommendation in his absence, viz. the recommendation in 1758 in the absence of one of the trustees. But where was he? He was not abroad. Why did not they write to him? A letter signed by him would have been sufficient. Therefore I am not to say, they might on that account delay more than a reasonable time. It was no reason at all. I cannot help thinking, the reason of their meeting in December was, that they heard, the Chancellor had issued a fiat for the presentation. Then they say, that finding a person was presented, which was not the fact, for he was not instituted or inducted, but the fiat only had issued, they thought, it would be in vain: and therefore made no nomination; and none has been made to this time. The question is whether I shall violate the intention, if I declare this vicar entitled to the benefits intended for the vicars of Polesworth. It is to be observed, though I do not lay great stress upon it, that even on the 22nd of December, when they met, this vicar was neither instituted nor inducted. It was competent to them then to have represented to the Chancellor the reason of the delay, and to have recommended some other person. If they had recommended a person he approved, for it cannot be contended, that he had not the power of rejecting the person recommended, and if they had given a reason for not recommending sooner, it was competent to the Chancellor to have revoked the fiat; for the institution did not take place till the

1794.

ATTORNEY-
GENERAL
v.

BOULTBEE.

[*387]

1794.
 ATTORNEY-
 GENERAL
 v.
 BOULTBEE.

[*388]

17th of January. They did nothing; and it is now said, this vicar is not entitled to this benefit. As to the doctrine of *cy pres* as applied to charities, this sensible distinction has prevailed: the Court will not decree execution of a trust of a charity in a *manner different from that intended, except so far as they see, that the intention cannot be executed literally, but another mode may be adopted consistent with his general intention, so as to execute it, though not in mode, in substance. If the mode becomes by subsequent circumstances impossible, the general object is not to be defeated, if it can be attained. In *Attorney-General v. The Bishop of Oxford*, the purpose was to build a church in the parish of A.; and the parish would not let the church be built: Lord KENYON very properly said, it could not be built anywhere else, and the intention must totally fail. So Mr. Justice BULLER's opinion in *Attorney-General v. Goulding*, 2 Bro. C. C. 428, though there may be some doubt about it in that case, went upon that ground. But the Court has said, where the general intention may be executed, it shall. In a case before me, *Brantham v. East Burgold*, the testator directed bread to be distributed to poor persons attending divine service, and chaunting his version of the psalms. They could not be chaunted, because not authorized: but I thought, his general object was to give the poor people the bread, and the chaunting the psalms was only accessory, because he thought his version as good as any other. Apply these principles to this case. Sir Francis Nethersole had two objects; the first was a general charitable object, and very proper; an anxious desire to provide what he specified in his declaration, what he thought a competent maintenance for the vicar. There was also another object. The question is, whether that was equally important; and was annexed to the first, so that they must stand and fall together. It was to secure to himself or his trustees the recommendation, or approbation at least, of the person nominated. If both these purposes can be effected, they ought: but did he mean the first object to fail, if from the obstinacy or neglect of his trustees the second could not take effect. That was not argued. Then there may be a case, in which this maintenance may be applied to the vicar, though he has not received that approbation; if it has

been prevented by the neglect of the trustees. Have they been guilty of neglect? Have the circumstances been such as to induce the Court to say, the general object shall prevail, though this condition cannot be complied with? They have not done all, they ought. I do not believe, they intended to defeat the testator's bounty: but they had in contemplation to make this recommendation, when it suited their convenience. That is a degree of negligence; though I do not impute to them anything criminal. It is said for the defendants, the Crown ought *to have waited six months. That is to convert them into patrons. They have only the nomination to the great seal; and must give the Chancellor notice; for the Chancellor is responsible for the person presented. The six months are with respect to a real patron. He loses his presentment, if he does not present six months after the death, not after the notice. Here it is plain, they had notice of the death; for Dabbs went to the Chancellor upon it. Was the Chancellor bound to wait longer than he did? He waited two months; and they permitted the presentation to be followed by institution; the person giving up his other prospects in life, and coming into that parish. It would be extraordinary if this should disappoint the material object, and this person should not have the benefits intended for the vicar. Under the circumstances this Court may overlook them, and think him entitled, though the condition is not complied with. The reason is, that though there is no considerable misconduct in the trustees, yet they have not been sufficiently diligent in the execution of their trust. I wished to find a case like this. I met by accident with two, from which something may be collected as to the rules governing this Court in the disposition of charities so as to overlook small circumstances, where they can, to promote the general intention. It seems to me, that *Attorney-General v. Rigby*, 8 P. Will. 145, and *Attorney-General v. Leigh*, subjoined in a note by the reporter, may possibly bear upon it. As to the first, what is there stated cannot be quite collected from the Registrar's book; therefore I suppose, it fell from the CHANCELLOR in giving judgment. The other case is more material, as it is stated in the Registrar's book, than in the report. The testator gave 100*l.* to be laid out in building seven houses,

1794.

ATTORNEY-
GENERAL
v.
BOULTBEE.

[*389]

1794.

ATTORNEY-
GENERAL
v.
BOULTBEE.

[*390]

and the rectory of B. to John and James Every and the heirs of John, upon condition, and to the intent, that they should erect seven houses; and lease them to seven poor men, such as they should think fit; and give the profits to them after defraying the expenses; and in case of default in the performance of the trust for three months after the same ought to have been performed, which I suppose means the building the houses, &c. the same for ever after to go to the minister and churchwardens of B.; I apprehend he meant, that then the trust should devolve upon them. Then a commission of charitable uses issued. It is observable, that under such commission they thought, they might add to, or prescribe the mode of executing, the intention. It *decrees, that John Every should erect the houses, and before Christmas next place therein seven poor men or women of the parish of B.; which was not required by the original; and so upon death or removal the vacancies were to be filled up by other poor men or women of the parish of B. within six months after they should become vacant; and 8*l.* to be paid to each of them. Afterwards upon an information the heir insisted, that he had a right to nominate any poor persons without regard to the parish of B. but the Court confirmed the decree of the commissioners; and decreed, that the heir, within two months after notice of a vacancy, should nominate out of the parish; and for default, it should devolve to the parish. He had nominated two persons not of the parish; and yet those two persons nominated in an irregular manner according to the decree were permitted to enjoy as long as they lived. Hence it appears, the Court will not permit the general intention to fail for want of circumstances annexed; which by the fault or neglect of the parties cannot take effect. Therefore this vicar is entitled to the benefits intended for the vicars of Polesworth; not upon the idea, that if the trustees had recommended in proper time, and that recommendation had not succeeded, that then he would have been entitled; but upon this, that the general object was, that there should be a good minister; and there was a secondary intention, that he should come in with the approbation of the trustees. The question is, Whether under these circumstances I do not answer his intention better by giving this benefit to the vicar, though

from the unfortunate neglect of the trustees he came in without their recommendation. I am of opinion, they ought to have taken more pains, than they did: and their neglect shall not defeat the general intention.

1794.
ATTORNEY-
GENERAL
v.
BOULTBEE.

As to the costs, I cannot think of saddling the trustees, who were left to judge for themselves, and had no particular mode pointed out. I should have thought it better for them to have kept to the precedent in their book. I am inclined to pursue the mode adopted in *Attorney-General v. Rigby*. As to the relator's costs, he will have all the rest, paying the trustees their costs. The direction is not literally complied with. It is said, the trustees ought not to have made any opposition: I do not think, they have made any. They have not disposed of the fund, or applied it to any other object: but they state, that *they are willing to act, as the Court shall direct; and the will being positive, they did not venture to apply it to this vicar. Therefore declare, that the relator is entitled to the house intended for the habitation of the minister, the tithes, &c. and direct an account of the rents and profits. I was thinking, whether I should lay down any rule: but leaving it with them, the same circumstance probably will never happen again.†

[*391]

At the request of the Counsel for the information, who suggested, that the trustees did not let the house, costs were reserved: but the MASTER OF THE ROLLS said, he did not blame them for not letting it; as they were afraid to stir.

† Upon appeal to the LORD CHANCELLOR his Lordship, conceiving himself to have an interest, referred it to Lord Chief Justice Eyre and

Lord Chief Baron M'Donald; and upon their certificate the decree was affirmed. 3 Ves. 220.

TAYLOR v. STIBBERT.†

(2 Vesey Jr. 437—443.)

1794.

July 27, 28, 30.

LOUGH-
BOROUGH,
L.C.

[437]

Purchaser with notice is bound in all respects as the vendor; therefore where tenant for life granted leases for lives under a power, and bound himself upon the dropping of a life to grant a new lease with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale, though the power is exceeded, yet if a life drops in the life of the lessor, the purchaser having notice must specifically perform by granting a new lease with the same provision. General notice to a purchaser, that there are leases, is notice of all their contents.

[*438]

THOMAS WOOD seised in fee of the manor of Portswood on the marriage of his son settled it (subject to certain trust terms) to the use of the father for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the use of the son for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to trustees for 500 years; remainder to the use of the first and other sons of the marriage in tail male; remainder to *trustees for 600 years; remainder to Wood the elder in fee. Power is given to Wood the elder for life, and after his death to his son for life, to let either in possession or reversion such parts, as had been usually let for life or lives, and also to demise by copy of court roll such parts as were usually granted that way for life or lives, for one, two, or three lives, or any number of years determinable on the dropping of one, two, or three lives, then in being, upon the antient and usual rent, or as great or beneficial rent as they were last demised at. There was also a power to Wood and his son to appoint new uses for the purpose of sale. Wood the elder afterwards let several parts of these premises to Taylor for 99 years, if he and two others should so long live. All the leases were by deed except one, which was by grant entered upon the court roll and copy of court roll. Upon these demises it was covenanted and agreed, that upon the death of either of the persons named, Taylor, his executors or administrators, would surrender the lease thereby granted to Wood, his heirs and assigns, that a new lease might be granted; and so

† *Caballero v. Henty* (1872), L. R. 9 Ch. 447; 43 L. J. Ch. 635.

1794.
TAYLOR
v.
STIBBERT.

upon the death of either of the persons to be named in any future lease or leases. After these leases Wood, his son, and the trustees sold the manor to Stibbert. One of the lives having dropped, the bill was filed by the tenant praying, that the defendant Stibbert should specifically perform the covenants in the leases, and the agreement in the admission; and grant new leases.

The tenant had laid out a considerable sum of money. The bill charged, that the covenant ran with the land, and that Stibbert had notice. The defendant Stibbert insisted, that Wood, being only tenant for life, had not power to enter into such covenant for renewal. The facts as to notice were, that Stibbert, when the conveyance to him was executed, the leases and tenants being described, asked, whether there were not covenants for renewal in the leases to Taylor; and was answered in the affirmative; and counterparts were produced to him: but Wood the elder said, that as he was tenant for life, and his son had not concurred, that covenant was of no effect; upon which they executed. In the conveyance there was a covenant against incumbrances particularly excepting the subsisting leases.

LORD CHANCELLOR :

[439]

As to the demise by grant entered upon the court roll, and copy of court roll delivered as evidence of the title of the lessee, it is not proper to call this a copyhold estate. No custom attaches upon it: but the owner may grant, or not, at his pleasure. There is no right in the person, who owns the estate, to compel the lord to act. I take it (it does not appear in the leases by deed) that the covenants for renewal were mutual. Whether it extends to the new lives will be a question of future consideration probably; which it is not proper now to determine. The plaintiff has contracted with Wood the elder, not only for the estate executed by him, but upon valuable consideration paid by him and received by Wood and upon consideration of mutual covenants, that Wood shall upon a given event execute to him the estate, he demands by his bill. As between these two it is only the common bill for a specific performance of a contract upon consideration actually paid and executed. It is one of the

1794.
TAYLOR
v.
STIBBERT.

[*440]

most ordinary subjects of relief. On the part of Wood it is impossible to support any objection to the performance of that engagement, in which he has bound himself and all his assets. It is not competent to him to say, he has not a sufficient estate to support the estate he contracted to make. He is bound to procure to the utmost extent of his means. The rule, that affects the purchaser is just as plain as that, which would entitle the plaintiff to a specific performance against Wood: if he is a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that, which the person, he represents, would be bound to do by the decree. It is admitted, that during the life of Wood, with regard to the leases by deed, Stibbert cannot decline the performance, at least to a certain extent, of the engagement entered into by Wood; that is, that he is bound to renew the life that has dropped in these leases; but that is not the decree, I must have made against Wood. I should not have decreed Wood to accept the nomination of a new life by Taylor, and to add that to the lives in being; but the decree against Wood would have been specifically to perform his covenant: that is, to execute a new lease specifying the covenants in the former *in totidem verbis*. It is a fallacy to state, that he is bound to a certain extent, and not to the whole. He is either not bound at all, or if as standing in the place of Wood, the engagement can be neither greater nor less than that of the person he *represents. The plaintiff being entitled to a specific performance of a definite covenant to grant particular leases, has the same right against Stibbert; who cannot say, he will do somewhat less than Wood engaged to do. The right against Stibbert, if any, is co-extensive with that against Wood. The first question offering itself to the consideration of a Court of equity is, whether the purchaser had notice. I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates, those tenants have. It has been determined, that a purchaser being told, particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to

year, was bound by a lease, that tenant had, which was a surprise upon him. That was rightly determined; for it was sufficient to put the purchaser upon inquiry, that he was informed, the estate was not in the actual possession of the person, with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests, as to the extent and terms of which it was his duty to inquire. In this particular case there is not merely that general knowledge; but in the treaty the particular leases and tenants were described, and the leases described were all exhibited: but if not exhibited, the case would not have stood the worse.* The question of notice therefore proceeds one step farther. Stibbert has not only the general notice, that the estate is in tenancy; but an account was given, that there were particular tenants, who held particular parts: and he was told they held by lease; that it was not a mere occupation; though the terms were not particularly specified. Leases by deed are usually attended with counterparts; those by copy of court roll are still better; for the evidence remains upon the rolls of the manor in possession of the owner or steward. Therefore all the information is with regard to both descriptions easily come at; and more easily, with less trouble, as to those entered upon the rental of the manor than the others. If he has notice of the lease, does not that necessarily import notice of all the covenants in it? He ought to inquire into the lease to know the terms, on which it was granted, and the rent paid; always speaking of it with regard to the tenant. He must look at the whole of it. It is important with regard to the interest he purchases, with regard to the engagements, he is about to contract with the tenants, that he should inform himself completely what their *rights are with regard to him, and his rights with regard to them. Therefore I have no difficulty to say, that in a case much less strong a purchaser knowing the estate is in tenancy, and being informed specifically, that it is in lease, is bound to know all the contents of the leases; and cannot take upon himself a partial knowledge. But when he was told, that Taylor had several leases with covenants for renewal, it is absurd to allow him to say, he looked at but one. That awakened his caution at least to look at the others. He

1794.
TAYLOR
v.
STIBBERT.

[*441]

1794.
 TAYLOR
 v.
 STIBBERT.

was satisfied with Wood's opinion; and proceeded without farther consideration to complete the contract, when he had abundance of information as to the facts. I cannot relieve him against that. It was urged with great force, that the exception of the subsisting leases in the covenant against incumbrances could not be confined to those past all attain and impeachment at law. The effect of that exception is to protect the person conveying from the consequences of any act to tenants having subsisting leases, which, though they might be liable to legal objections, yet would give a title to the lessee to recover upon the covenant for quiet enjoyment against the person, from whom he derived. It is said, Stibbert could not avail himself much of the information, he received so late as the time appointed for execution; because the son and the trustees were parties; and he was bound to pay the money. There were other parties: but Wood the father was the essential party; the *sine quâ non*; and if the purchaser was deceived by that party, from whom principally the conveyance was to move, whose consent to sell was a necessary quality, and could have had a right to a recompense as against him, this Court, if he had held back, and had stated a substantial ground, would not have compelled him to go on, and take a worse title, or more incumbered estate, than he contracted for. It was very ingeniously said, that the effect of the notice could only be notice, that the party had executed a lease; and being tenant for life, the notice could only convey this idea, that the lease was such, as in equity and according to his estate the tenant for life was enabled to make. The notice in all these cases is not the title to make it, but that such lease in fact exists: but the argument cannot apply against actual notice interposed before payment of the money and execution of the deed. The matter was entire; and he might have retained, if he could have qualified his refusal. The great argument is, that as the leases would have been void as against the son and issue in tail, they *cannot extend farther than such an interest, as Wood the tenant for life could give under the terms of the power. It is supposed under that, that the son would have had a right to decline performance of the covenant, and even to enter upon the tenants claiming under the leases, if they were a contravention of the

power; for they were void at law; and that the trustees to protect the interests of the issue in tail would have had a right to enter to avoid these leases. I admit it: but upon what ground does Stibbert take to himself that right? These leases are not void undoubtedly: they are good for the life of Wood; and if the intermediate estates should fail in his life; and an estate should be taken after his death under his reversion in fee, they would be good to all intents and purposes. They are not void therefore in themselves: but they are voidable unquestionably, where they interfere with the interests of parties claiming under the consideration of the marriage settlement. Therefore the issue in tail may avoid them: but how that consideration can reach a person not standing under that consideration, how it can affect the interest of an estate taken totally out of the settlement by execution of the power to sell, I cannot conceive. When that power is executed, the estate is taken out of the settlement: the only claim under the settlement is as to the price. It is supposed, the estate was rendered less valuable; and a worse price was obtained; by which the parties claiming under the consideration of the settlement would suffer. That ground, if proper parties were before me, would do: but how, against whom, and upon what terms? Stibbert must argue upon this supposition; that he paid less than the estate was worth; that he had notice of the settlement, and paid an inferior price to the injury of those claiming under the settlement. The consequence is, that he and the trustees are answerable to the objects of the settlement; and ought to make good what he had no right to purchase, nor they to sell, at an inferior price. The case put is strong, and the consequence undeniable, that if the trustees, and the father and son, had granted a long lease at a pepper-corn rent, and had conveyed to Stibbert, and he had paid the small value of that reversion, it could not displace the term; it would have no effect as between the persons entitled to that long term, and the person, who purchased only the reversion, and subject to that term. It is impossible for him to say, the interest for years is void, and he has a right to take it, not for the purposes of the settlement, but for his own profit; that he had a right to take the estate as of more value by setting that

1794.
TAYLOR
v.
STIBBERT.

1794.
TAYLOR
v.
STIBBERT.

aside than the consideration he had paid. The true consequence as to the settlement is this: when the parties to the settlement chose to execute the power reserved to the father and son to appoint new uses of the fee, the settlement with regard to the estate was a nullity: it was gone; and the purchaser under that power cannot claim any thing under the settlement. It is not true in fact, that less was paid on account of these leases: but if so, it is not competent to the purchaser to claim it, not in order to carry the value over to the uses of the settlement, but to his own pocket. He takes the legal fee from the trustees, and by the appointment of the father and son. It moves from them. If the son's interest can be conceived in existence, I doubt, whether he could after joining dispute it. Therefore on payment of the fine by the plaintiff Stibbert shall execute the covenant in the several indentures, under which the plaintiff holds, and the agreement contained in the admission by copy of Court Roll. I am not now to determine, what will be the construction of the covenant. I find, there have been opinions, which I think require a good deal of consideration, perhaps re-consideration, as to the effect of such covenants; and cases decided, which may require a review: but I would not decide it here. When the thing, I have ordered, is done, it becomes a legal interest: then I should think it necessary as to the construction of the covenant to have the opinion of a Court of law. The defendant Stibbert must pay the costs.

Though covenants for renewal may obtain in leases, I think it not well considered in any court to imply them against express words. I would rather bear a leaning against the construction; and therefore one or two of the cases strike me as requiring a good deal of consideration. I allude particularly to the cases upon leases granted by Mr. Booth of Lancashire, in which the covenant was held to exist.

CLENNELL *v.* LEWTHWAITE.†

THORNTON *v.* TRACY.

(2 Vesey Jr. 465—476, 644—651.)

Executor is entitled to an unbequeathed residue, unless there is a strong and violent presumption against him: a legacy to him affords such presumption: but parol evidence of the intention is admissible to rebut that; and is not to be confined to the time of making the will: but it must be to shew the intention at that time only. Residue unbequeathed decreed to the executor, who was a legatee, upon the intention appearing in the will and by parol evidence.

THESE causes were independent of each other: but involving the same question, and being brought forward under similar circumstances, they were considered and decided together; and the general observations of the Court were applied to both.

The former arose upon the following will of John Lewthwaite, dated October 30th, 1780; “I John Lewthwaite of Whitehaven in the county of Cumberland, gentleman, being willing and mindful to dispose of my worldly estate do make this my last will and testament in manner following. As touching the worldly estate, wherewith it has pleased God to bless me in this life, I give, devise, and dispose of, the same in the following manner and form: *Imprimis* I give and bequeath unto my kinswoman Mrs. Postlethwaite and her heirs for ever 1,000*l.* I also give unto my kinswoman Mrs. Elizabeth Hunter and her heirs for ever 500*l.* I also give unto her sister Mrs. Agnes Lewthwaite and her heirs 500*l.* I also give unto Mr. John Lewthwaite of the island of Dominica and his heirs my freehold messuage and tenement at Kirksanton in the said county of Cumberland. I also give unto Mr. William Lewthwaite of Broadgate in the said county 1,000*l.* I also give unto the said John Lewthwaite and *his heirs all my freehold messuages and tenements in King Street, Queen Street, Roper Street, and Strand Street, in Whitehaven in the said county; and in default of issue lawfully begotten, to his brother Mr. William Lewthwaite and his heirs for ever; and I do hereby

1794.
August 9.
ARDEN, M.R.

1795.
July 21, 22.

LOUGH-
BOROUGH,
L.C.

[465]

[*466]

† *Bacon's Will, Camp v. Coe* (1886) 31 Ch. D. 460, 463; 55 L. J. Ch. 368.

NOTE.—The law upon this point was altered by 1 Will. IV. c. 40, as between executor and next of kin,

but this case is still an authority in favour of an executor claiming undisposed of residue against the Crown. —O.A.S.

1794.

CLENNELL

c.

LEWTH-
WAITE.

THORNTON

c.

TRACY.

make and appoint the said William Lewthwaite and his heirs executors of this my last will and testament."

The testator died on the 22nd of October, 1790. His wife and only son both died before he made his will; the latter in July, 1779; the former in September, 1780. John Lewthwaite the devisee of the real estate died in the testator's life; in consequence of which William the executor was also heir-at-law. After the debts, &c. were paid, the personal estate afforded a surplus of about 70,000*l*. The bill was filed by several first cousins of the testator to have the residue distributed among the next of kin. The executor went into parol evidence of the testator's intention in his favour.

John Dixon, Esq., deposed, that the testator for the last ten years on account of his infirmities employed the defendant to assist him in managing his affairs; and seldom transacted any business without consulting him. In 1782 the deponent went to the testator to endeavour to persuade him to accept a conveyance of the equity of redemption of an estate, upon which he had a mortgage, with respect to which there was some dispute: the testator said, his advice was good, but he must excuse his making any answer, till he had seen his relation William Lewthwaite; as he would leave it to his choice, whether he would have it land or money. The deponent frequently assisted the testator in examining his banker's accounts; and on one of those occasions observed to him, that his fortune in the funds was accumulating very fast; and he hoped, he had settled his affairs: the testator answered, he had much to his satisfaction; that all he had was to go to Broadgate. This conversation happened some time after the death of the testator's wife and son, in 1783 or 1784; and at that time the defendant lived at Broadgate. The testator complained to the deponent, that Lawson one of the plaintiffs had used him very ill by applying to him as a trustee in the will of Sir Wilfred Lawson to consent to an application to Parliament to dock the intail. There was a great shyness between the Lawson family and the testator to his death. The testator informed the deponent, that Lawson's son had called *upon him, and that he scarce knew him: the deponent expressing his surprise, that he did not know so near a relation as Mr. Lawson, who

might possibly expect to come in for some part of his fortune, he answered, it was then too late.

Isabella Allison, a servant of the testator, deposed, that after the death of his son his wife pressed him to make a will; and on that subject he frequently declared to his wife, that he held it good to keep the name up in the family. The deponent never heard him name an other relation of the Lewthwaites but the family at Broadgate; and once he received a letter from a person of that name at Chester claiming to be his relation; upon which he was very angry; and said, he had no such relation there. There was no connection between the testator and any of the persons claiming as his next of kin.

Henry Bowman an attorney deposed, that upon the 16th of November, 1786, he went to take an abstract of a mortgage, which the testator had, in order to prepare an assignment; and with great difficulty prevailed on the testator to look for, and let him have, the deed; as he declared, he did not like to do any business without the assistance of his relation William Lewthwaite, who had the management of all his matters. On the 22nd of the same month he went to have the assignment executed; and in the course of conversation asked the testator if Lawson the plaintiff was not his next of kin, and would not get great part of his personal estate: the testator replied with some earnestness, "No: the bulk or most part of my personal estate will go to my relation Mr. Lewthwaite of Broadgate."

Mary Deane deposed, that she had heard the testator say, his father was brought up at Broadgate; and it was the family home of the Lewthwaites; and that from the death of Sir Wilfred Lawson he had dropped all connection with that family, having a dislike to his brother Sir Gilfrid the plaintiff.

Anne Rotherie, a servant of the testator, deposed, that after the death of his son, he sent a favourite greyhound, upon which he set a great value, to be taken care of by the defendant, who, he said, he thought would do it best. After 1780 in a conversation with him respecting his intention to sell a pew in a chapel she said, she was afraid he was doing wrong; as she thought *it would after his death belong to Mrs. Ellison his wife's niece: he answered, it was his own property; and Mrs. Ellison should not

1794.

CLENNELL
v.
LEWTH-
WAITE.
THORNTON
v.
TRACY.

1794.
 CLENNELL
 v.
 LEWTH-
 WAITE.
 THORNTON
 v.
 TRACY.

have it ; for he had made his will, and given all his property to the defendant, except a few legacies ; and that he had given 1,000*l.* to Mrs. Postlethwaite, because she had a family, and was more needy than the other legatees ; and that he had given 500*l.* each to Mrs. Hunter and Mrs. Agnes Lewthwaite the defendant's sisters. The testator would not listen to the deponent's entreaties in favour of Mrs. Ellison ; but said, he had a right to do as he thought fit with his own ; and he would never alter what he had done. She frequently heard him say since the year 1780 down to within three months of his death, that neither Sir Gilfrid Lawson the plaintiff nor any of the Lawson family should ever have a penny of his money or effects. There was no connection between him and that family or the other plaintiffs. The plaintiff Sarah Cockburne applied to the testator for relief saying, her brother the plaintiff Lawson had refused to relieve her : the testator refused to assist her ; and said, she was to expect nothing from him. The deponent heard frequent declarations from the testator during the last six or seven years of his life, that he had given the greatest part of his fortune to the defendant. This witness confirmed the deposition as to the letter to the testator claiming kindred with him.

Eleanor Postlethwaite and other witnesses spoke generally to the testator's regard for, and intimacy with the defendant and his family.

The answer admitted, that about two years before the testator's death the defendant in looking among some papers discovered the will ; and about August, 1790, he shewed it to his solicitor : and took an opinion of counsel as to his title to the residue : the opinion was in favour of his title ; but that it was a very doubtful case ; and that he might give parol evidence of the testator's declarations to explain his intention.

The other cause arose upon the following will of Anne Loud.
 " I give and bequeath to James Tracy the sum of 800*l.* I give to my servant Mary Lamble the sum of 20*l.* Item, I give to John Thornton the estate at Portlemouth, called Luckaft's estate. The orchards and house at Salcombe is to be sold by my executor hereinafter named. Item, I give *to my sister Eleanor the sum

of one shilling. I give to my sister Esther Thornton the sum of 5*l.* yearly to be paid by her son John out of the rent from Luckaft's estate. Item, I give to Mary Elliot and Elizabeth Kingston my brother's children the sum of 10*l.* each. Item, I give to Robert and Cranford Thornton the sum of 5*l.* each. Item, I give to Samuel Thornton the sum of one shilling. Item, I give all my wearing apparel to my sisters, equally to be divided between them. Item, I give to Anne Cranford Tracy my bed performed, which I now lay upon. Item, I give unto my sister Elizabeth Loud the sum of one shilling. I likewise appoint James Tracy of Dartmouth, cooper, my whole and sole executor."

This will was drawn by Tracy the executor; and was executed by the testatrix on the 21st of March, 1791; and on the same day very soon afterwards she died. The bill was filed against the executor by Esther Thornton, widow, and Eleanor Stone, Mary Elliot, and Elizabeth Kingston, with their husbands, to have the residue distributed among the next of kin. Elizabeth Loud sister to the testatrix and mother of the executor's wife was a defendant. The executor by his answer said, that his legacy was intended for his wife: but he not knowing whether a married woman could take a legacy, thought it better to put it down in his own name. He went into parol evidence.

Mary Lambie deposed, that she frequently heard the testatrix declare, she had been all her life providing for her sister Esther Thornton and her family; and therefore designed to leave her but a trifle by her will; and that she would not leave a farthing to her sister Eleanor Stone, with whom she lived on very bad terms; and that she would leave the greatest part of her property to the defendant and his wife. When she was giving instructions for her will, she asked Elizabeth Tracy the defendant's wife what she should give her: she answered, "what you please, aunt." The testatrix said "300*l.*" The defendant asked the testatrix, what she would give her nephew John Thornton: she replied, "the Portlemouth estate;" and directed, that he should pay thereout to his mother an annuity of 5*l.* The defendant then asked, whether she would give Samuel Thornton, Small's estate: she replied, "no: he hath had enough already: give him one shilling." The defendant asked, what

1794.
CLENELL
v.
LEWTH-
WAITE.
THORNTON
v.
TRACY.

1794.
 CLENNELL
 v.
 LEWTH-
 WAITE.
 THORNTON
 v.
 TRACY.
 [*470]

she would give her brother's children at Dittisham, meaning the plaintiffs Mary Elliot and Elizabeth Kingston: *she replied, "stop;" and after some little time said, "5*l.* each:" the defendant said, she could afford them more: she immediately answered, "I am afraid I shall give away too much from you:" he said, she had enough, and asked, if he should give them 10*l.* each: she desired him to do as he pleased; and he accordingly put down 10*l.* to each of them. She then ordered him to put down 5*l.* each to her nephews Robert and Cranford Thornton. He asked, what she would give her sister Eleanor Stone: she replied, "nothing;" but after a little hesitation said, "you must give her a shilling; or else it will not stand in law." She then directed him to put down one shilling to her sister Elizabeth Loud; and said to him and his wife, "you maintain your mother:" Elizabeth Tracy answered, "yes, aunt." He then asked, whom she would have for the executor: she answered, "you, James." A little before her death in conversation with the defendant and his wife about the rent of one of her estates, which she thought he was going to let at an undervalue, she told him, he should endeavour to make the most of it; as the more he made of it, the better it would be for himself.

Sarah Hewitt deposed, that the testatrix declared, she designed to leave her sister Esther Thornton an annuity of 5*l.* out of the Portlemouth estate; and that she would leave her sister Eleanor Stone but one shilling; as she had enough already. This witness confirmed the last as to what passed at the making the will.

John Thornton deposed, that the testatrix frequently declared, her sister Eleanor Stone should never be the better for her; because she used her so ill.

These witnesses and others deposed, that the defendant's wife was the favourite niece of the testatrix; that she never transacted any business without the assistance and advice of her and her husband; and had said, they were the only friends she had left.

There was no evidence for the next of kin in either cause.

[471] MASTER OF THE ROLLS:

These two causes have been long depending. I have taken the more time on account of a doubt suggested by a learned

Judge with regard to the admission of parol evidence. No man has a greater regard than I have for his decisions and his doubts; and I should have been glad to have found myself warranted to hold parol evidence not admissible. No man sees the danger, or feels the inconvenience, of admitting it more: but I have looked carefully into all the cases. They are so numerous, that it is a disgrace to the Court. There are near fifty in print upon this point. The great principles of the cases are perfectly decided; and are laid down very clearly in *Nourse v. Finch*, and *Hornsby v. Finch*, 4 Bro. C. C. 289; and *Bowker v. Hunter*, 1 Bro. C. C. 928; and though Lord MACCLESFIELD in *The Duke of Rutland v. The Duchess of Rutland*, 2 P. W. 212, does seem to doubt, whether before *Foster v. Mount*, 1 Vern. 478, an executor, as such, was anything more than a trustee, it is clear ever since that case, and has been uniformly acquiesced in, whether right or wrong, that making a man executor does vest in him the whole of the testator's personal property, who shall be taken to have intended to give it to him beneficially, unless there is a strong and violent presumption to the contrary: I say, a strong and violent presumption; for though in *Bowker v. Hunter*, Lord THURLOW is made to say, it must be an irresistible inference, that is not the rule: but it must be, as it is stated in many cases, a strong and violent presumption. Supposing this to be the rule, *Foster v. Mount* has decided, that a legacy given to an executor, or as in that case equal legacies to two, shall afford that strong and violent presumption to deprive him of the residue. It was supposed, that in that case there was something of fraud: but in the note to *Petit v. Smith*, 2 P. Will. 7, it is shewn and must be understood to have been Lord JEFFERYS's opinion, that they were barred, not on account of fraud, but by having legacies; which was inconsistent with the intention to give the residue to them. I do not intend to go through all the cases: but chiefly those, which bear in some degree upon the question of parol evidence. That case was in 1687. In 1690 *Cordell v. Noden*, 2 Vern. 148, occurred: the executors were held clearly trustees of the surplus: but then the *Court did what could not be warranted by ordering the residue to be distributed among the next of kin in proportion to their

1794.
 CLENNELL
 v.
 LEWTE-
 WAITE.
 THORNTON
 v.
 TRACY.

[*472]

1794.
 CLENNELL
 v.
 LEWTH-
 WAITE.
 THORNTON
 v.
 TRACY.

legacies. In *Bailey v. Powell*, Pre. Ch. 92; 2 Vern. 361, a distribution was decreed. In 1695 *Petit v. Smith* was determined. That is very material; for it shews, that at that early period proofs were admitted. The evidence was admitted, but was not thought sufficient. Mr. Cox has there collected the cases upon this point; and particularly those of parol evidence. I do not much agree with the doctrine of proofs being admitted to explain a will in writing. *Lord Gainsborough v. Lady Gainsborough*, in 1691, 2 Vern. 252, was not warranted by any of the rules, that had obtained: but I believe, it went upon the ground of fraud; which Mr. Justice BULLER thinks the ground of all these cases. Then it began to be established, that a legacy would exclude an executor, but a legacy to the next of kin was not sufficient to raise a counter presumption. Then came a case very material; *Lady Granville v. The Duchess of Beaufort*, in 1709, 2 Vern. 648; 1 P. Will. 114; 1 Bro. P. C. 305; and that was followed by a similar case, *Littlebury v. Buckley*, 1 Bro. P. C. 340; cited 2 Vern. 677; 2 P. Will. 159. In the former proofs were allowed to be read for the executrix; yet a distribution was decreed: but the House of Lords upon the proofs alone reversed the decree. A case stronger from admitting the evidence than *Littlebury v. Buckley* cannot be. In the former case it does not appear, what the proofs were, or to what time they referred: but in the latter the evidence stated by the appellant's counsel is, that for many years before the death of the testator there was a strict friendship between him and the appellant; to whom, he constantly declared, he designed to give his personal estate; and upon this evidence the House of Lords reversed Lord KING's decree. It would be pretty strong after this to say, evidence is not admissible. The only proper course is what Lord KING intended, an Act of Parliament. If these two cases had not been followed by any others, and much more as they have never been impugned, I must hold myself bound. The next case is *Rawlins v. Powell*, in 1715, 1 P. Will. 297, which came before three learned Judges. There the proofs, which were at the time of the will, were admitted. It ended by a sort of compromise. The next was *Batchelor v. Searl*, 2 Vern. 786, in 1716. The evidence was admitted. The next was *Heron v. Newton*, in 1722, before

Sir Joseph Jekyll, 9 Mod. 11. By the registrar's *book it appears, the proofs were read; and in 2 P. W. 160, it is stated thus; that though a legacy was given to the executor, who was no relation, yet was the surplus also decreed to him upon proof read of the testator's intention, that it should be so. *Rachfield v. Careless* is reported 2 P. W. 158, with a great number of references by Mr. Cox, and also in 9 Mod. 9. Mr. Justice Powis rejected the evidence, or laid no stress upon it, because the legacy to the executor was for his care; and he was right; for there was irresistible evidence against the executor; in which case I would not admit it. He says, it was so held in *May v. Lewin*: but he did not deny, that it might be admitted, if there were no words tantamount to a declaration of trust; and he mentioned *Lady Granville v. The Duchess of Beaufort*, and *Littlebury v. Buckley*. Then came *Brasbridge v. Woodroffe*, 2 Atk. 68, where the executors had unequal legacies. I quote it only for this, that though they have legacies, yet if it appears by evidence, that the testatrix always declared, the next of kin should have nothing, that is sufficient. In *Ulrich v. Litchfield*, 2 Atk. 372, evidence was refused: but Lord HARDWICKE expressly recognises the cases admitting it upon resulting trusts. Then came *Nourse v. Finch*. The great argument is founded upon the doubts mentioned in Mr. Justice BULLER's very able judgment; and that is very material: but we must consider, that the *dicta* of Judges stated by reporters upon collateral points not in judgment before them are always to be taken with great allowance. In *Blinkhorn v. Feast*, 2 Ves. 27, Lord HARDWICKE says, he does not give an opinion to reject the evidence in all events; but lays it out of the case, as there is no necessity to enter into it. It does seem, as if he entertained a doubt; and Mr. Justice BULLER uses that as an argument against admitting the evidence; and refers to *The Duke of Rutland v. The Duchess of Rutland*, where Lord MACCLESFIELD held pretty much the same language, except as to such evidence as applies to the time of making the will. Mr. Justice BULLER seems to have said, that he would reject the evidence, if he could, and if he was to continue longer in this Court; or at least that he would confine it to the time of making the will: but I think, I am not able to do so. As to what Lord

1794.

CLENNELL

v.

LEWTH-

WAITE.

THORNTON

v.

TRACY.

[*473]

1794.
 CLENNELL
 v.
 LEWTH-
 WAITE.
 THORNTON
 v.
 TRACY.
 [*474]

HARDWICKE said in *Blinkhorn v. Feast*, it is completely contradicted by him a year afterwards in *Lake v. Lake*, 1 Wils. 313; Amb. 126. As to that Mr. Cox says in a note 1 P. W. 10, and I believe he is right, that is the last case, which has been decided on parol evidence. *I cannot find any other before *Nourse v. Finch*. I have looked into *Lake v. Lake*; being determined if possible to see, what that case was. The bill being dismissed, unfortunately nothing appears in the registrar's book, except that the proofs were read. I therefore sent for the depositions to see, whether they corresponded with those in the case as reported. There cannot be a stronger case for parol evidence; for Lord HARDWICKE found himself bound not only to admit it, but to decide upon it. The reports agree both in the evidence, and the opinion and reasons of the Court; and the evidence is taken almost *verbatim* in both. The evidence was, that the testator declared, he had taken good care of his wife; and the reason, he had given her a sum certain, was, that he had great losses, and thought his affairs were in bad hands; but that if she had good luck in getting in his effects, there would be something more, which would be all her own. It is in effect, as it is stated in the reports. After this evidence has never been rejected: I do not say it has ever been decreed upon. Then came *Nourse v. Finch*. There, though it was admitted Mr. Justice BULLER throws out those doubts: but I cannot think, I have a right to entertain them so strongly, as he did. Now therefore the rule is clearly established, that the executor shall have the residue, unless there is a strong and violent presumption to the contrary; that a legacy to him affords that presumption: but that it is not so strong to take away his legal right as to deprive him of the opportunity of proving by parol evidence, that the testator did intend, that he should have it. Therefore I am bound to admit it; for those cases clearly establish it. I am sorry, it is left in that precarious way: but whatever the private opinion of a Judge may be, it is safer to conform to established decisions, particularly in the House of Lords: but if not, yet the errors of great Judges acquiesced in by a succession of Judges for a series of years ought to be adhered to.

As to the two causes before me, I should have been glad to

have rejected the evidence *in toto*; though perhaps in one of them the words would hardly be sufficient; but being admitted, I must decide upon the import of it. In *Nourse v. Finch* and *Hornsby v. Finch* it is clear, neither Mr. Justice BULLER nor the LORD CHANCELLOR decided upon the point as to the parol evidence. They avoided that: but it was, because upon the whole of the evidence, when admitted, it was, as I think it clearly was, in *favour of the next of kin; for if Walker is believed, his evidence is a demonstration, that the testator, when he made the will, had an intention to dispose of the residue by another instrument. It is clear, that no parol evidence of an intention afterwards to give it to him will be sufficient; it can be only to shew, what was intended at the time, he was made executor. Both the CHANCELLOR and Mr. Justice BULLER thought, the evidence was in favour of the next of kin; therefore that furnishes no case at all: but the CHANCELLOR did not doubt about the admissibility of it. The only question then is as to the effect of it here. As to the first of these causes, a very extraordinary part of the will, and which gives great strength and credibility to the evidence, is the addition of the words "and his heirs." Great stress was laid upon them. Perhaps that alone is too slight: but coupled with the evidence, can anyone doubt, the testator had some meaning, and had an idea of a succession to personal something like the succession to real estate. No matter, whether it could take effect: it is enough, that he intended to give it beneficially, especially if that intention is corroborated by parol evidence. He had some idea of giving something to the heirs. He could not mean them to take only a trust: men, of whom he knew nothing. He meant to make them his *heredes facti* as to his personal. The step taken upon discovering the will is rather a suspicious circumstance. Upon the opinion I suppose he was to determine, whether his relation should make his will more explicit. I lay very little stress upon loose general declarations of regard: but the evidence is positive, that the testator intended, he should have the surplus, when he meant to make him executor. If therefore it is admissible, I must ask myself, whether I am satisfied, he did intend the executor to have the residue: I have no difficulty in saying, that this evidence coupled with the will

1794.
CLENNELL
v.
LEWTH-
WAITE.
THORNTON
v.
TRACY.

[*475]

1794.
 CLENNELL
 v.
 LEWTH-
 WAITE.
 THORNTON
 v.
 TRACY.

and the expression "his heirs" shews it; and I am bound to admit it, though not arising at the time of making the will; and must therefore dismiss the bill.

[*476] The other cause is upon the same point; and these with *Hornsby v. Finch* and many others, which I have no doubt will come, make it necessary to settle it one way or other. I hope, the LORD CHANCELLOR will, as Lord KING intended, take steps to make the legislature interfere. This cause is in some degree different from the other. The will is very short: but the expressions are not immaterial. The expression "whole and sole *executor" occurs in one of the cases, I have commented on. The gift of one shilling to her sister Eleanor is very material. I do not say, even that, which is however different from giving substantial legacies, would be enough: but coupled with the evidence it is strong; for it must have some object: and when the evidence is read, though it is said to be slight, yet taken with the will it is strong. It is no uncommon thing for people who are not lawyers, to consider making a man executor like making him heir; and the words "whole and sole" must have some meaning. Can it be only, that he was to have the trust of disposing of her property? It conveys some strong idea of something beneficial: but that alone would not do. In considering the evidence I lay out of the case declarations of intention as to what she would do. It is not necessary to comment particularly upon it: it is sufficient to say, that upon a full revision of all the authorities, and the two cases in the House of Lords, I am bound to lay this down, that a legacy shall exclude an executor, unless evidence can be given to rebut that presumption arising from it; that parol evidence may be given for that purpose; and that I am satisfied with the evidence, which has been given. I must therefore decree for the defendants in both these causes, whatever may be my private opinion upon the point of admitting the evidence.

As to *Clelland v. Lewthwaite*, if the next of kin are not legatees, let the bill be dismissed without costs. In *Thornton v. Tracy* take the usual accounts of the legacies due to the plaintiffs; and declare, that the residue belongs to the defendant.

[The cause of *Clennell v. Lewthwaite* came on upon appeal from the above decree. (2 Ves. Jr. 644.)

1795.
July 21, 22.

—
CLENELL
v.
LEWTH-
WAITE.

Mr. Piggott, Mr. Lloyd, Mr. Simeon, and Mr. Stanley, for the plaintiffs.

The Attorney-General, Solicitor-General, Mr. Mansfield, Mr. Graham, and Mr. Hall, in support of the decree.]

LORD CHANCELLOR :

[648]

When a question of this kind has come before me, I confess, I have felt a considerable degree of doubt and hesitation. The cases have turned upon distinctions so extremely nice, that I have not been able to find any sure ground to tread upon, except standing upon the bottom of authorities, that have been decided. The analysis of the grounds of the distinctions I have always found extremely difficult. It is unnecessary to go through the cases. They are remarkably well stated and digested in Mr. Cox's note upon *Farrington v. Knightly*, 1 P. Will. 550. It is undoubtedly clear, that the appointment of an executor gives him the whole residue. That there may be circumstances occurring in the will to enable a Court of Equity to hold upon the construction of that instrument, that nothing more than an office was conferred by that appointment, is also a very clear proposition. The great difficulty has been to determine, what should be the circumstances to enable the Court to raise contrary to the legal operation a trust upon the interest he takes. The particular bias, that has run through the cases, is very observable; arising probably from the first impression made by some case upon the mind of a particular Judge; and Lord MACCLESFIELD seems disposed to think it the better general proposition to hold the executor a trustee, unless there are circumstances in his favour to shew, that was not the intention; that *ex vi termini* the execution of the will imports a trust; which it certainly does for some purposes: it is not correct to call it so, but a legal obligation to pay the debts and legacies. I cannot say, the bias of my mind has taken that course. I think it is contrary to what unlearned men have understood by the appointment of an

1795.

CLENNELL

C.

LEWTH-

WAITE.

[*649]

executor. It is generally understood to be the establishing an heir of the personal estate. From the case of *Foster v. Mount* downwards it has been treated as a general positive proposition, that a legacy shall exclude him. Putting aside the supposition of practice, which is upon very good authority, that *of Lord Guernsey, who cited it in the House of Lords, and who was a leading counsel in this Court at the time of Lord JEFFERYS's decree, it is a large conclusion to be drawn from that case upon the particular circumstances: a small legacy was given to the executor for his care: it is not immaterial, that he was the attorney: the testator had children; and the surplus turned out 5,000*l*. Therefore it is not a case simply of a legacy given to an executor *ipso facto* turning him into a trustee. But I am inclined to hold that to be the general rule, as stated by Mr. Piggott; a rule, upon which this Court has proceeded, and which has been established and recognised by many cases; and where the case is simply so, I should think myself bound to follow that rule. On the other hand it is just as established (and I am at a loss to know how that came in, unless it was to set it a little right the other way) that parol evidence to prove the executor was intended to have all, the law would give him, and to prevent this Court from imposing upon him a trust, is to be admitted. It has been uniformly admitted. There is no case, in which it has been rejected. Judges have been often uneasy (and I do not wonder at it) in the application of such evidence as evidence given to the Court of Chancery in a case, where there can by no possibility be an opportunity of trying it at law. From the loose manner, in which depositions are taken, it is impossible, that those used to examination *vivâ voce* must not be so. Admitting then, that a legacy to the executor, unless there are some other circumstances to countervail it, will turn the surplus into a trust for the next of kin, and the other proposition, that parol evidence may be admitted to shew, that is not the true construction upon that will, the only question a judge can ask himself, when it comes before him upon him parol evidence is, whether the effect of the evidence upon his mind is to satisfy him, that the executor ought to be left in full possession of that right, the nomination as executor gives him by law. It is very natural, that the counsel

for the appellant should insist upon separating it: but that is not the way to judge of it. I am to take the whole. *Juncta jurant.* The will itself is part of the case. I cannot shut out the will and consider the evidence, nor shut out the evidence, and consider the will. I must take the whole together; and it has happened in most of the cases, that the parol evidence has had a considerable degree of application given to it from the terms in which the will was drawn. In this case the will was made at a very advanced period of life, but when, it appears from all the evidence, he was much in possession of his understanding. It is *not in the ordinary terms in which a man of business would express it. Words are used undoubtedly not in their common meaning, and in a way that it is difficult to know, what he meant; the words not being applicable to the subject. The circumstances of the family were these. This son, an only child, who had lived to the age of 42, and during whose life, it does not appear, he ever thought of making a will, was dead. His wife was also dead. He then makes his will. No family is noticed in it but the family of the defendant. How is he appointed executor? The testator had got into the habit of using the words "heirs" and "for ever;" and he appoints the defendant and his heirs executors. They are very unapt words, and such as no one, who knew their just application, would have used: but I cannot say, it is so absolutely dark and blank nonsense, that nothing is to be inferred from it. It is difficult to resist the inference, that in his idea it was a mode of describing the complete and entire interest, he meant they should take in the interests given. Though a slight circumstance, yet it is not to be wholly laid out of the case, that in the beginning of the will he sets out with a declaration of intention to dispose of all his property: what he does dispose of is a very inconsiderable part. His wife and only child being dead, his bounty is pointed to the Lewthwaite family at Broadgate. The real estate he gives to the eldest of them, who was abroad, but with a limited interest; and he gives these legacies. Then I am to look at the parol evidence. By that he seems to have been very unwilling to give anything in his life. He had relations on the part of his mother. Occasions had drawn him to know something of them, but not

1795.

CLENNELL

v.
LEWTH-
WAITE.

[*650]

1795.
 CLENNELL
 v.
 LEWTH-
 WAITE.

[*651]

favourably. Little account is given of his having any intercourse good or bad with the others : but with that family, the Lawsons, who were cousin germans once removed, he certainly had. A habit had continued of reposing his general affairs upon the defendant. In his material transactions he consulted him. That is general evidence, and if it rested there, would be scarcely sufficient for a jury : but then the particular instances in Dixon's, Bowman's, and Rotherie's evidence are so extremely strong and pointed, that there is hardly a degree of doubt ; for the effect of all the evidence is not talking of an intention in favour of William Lewthwaite, but of what he had done. He employs him in his business, because he had done something in his favour. In the conversation with Dixon about the mortgage he declines entering upon it, and adds the reason *with reference to the choice of the defendant. Upon another occasion, when settling his banker's books, Dixon's curiosity urges him to that inquiry : an apology was made ; and a civil and kind answer given. It is the conversation of a man of a firm mind and intelligent understanding. He then gives a full answer to the inquiry ; not that he would settle his affairs, but that he had settled them, and that all he had was to go to Broadgate. It is said, that might refer to a future act : but it follows upon his having said, he had settled his affairs ; and then it is the result of that settlement. Bowman's conversation with him arises upon an application for a little more money upon the mortgage he had from Mrs. Postlethwaite : first the sum of twenty guineas is begged, then ten : finding him inexorable upon the head of relief Bowman says a little peevishly, that Sir Gilfrid Lawson is his next of kin and will get all his money : he answers quickly upon that " no : the bulk or most part of my personal estate will go to my relation Mr. Lewthwaite of Broadgate." The evidence of Rotherie is more particular still. Having been servant to his wife, continuing his housekeeper, and in that capacity and at his time of life being much about him, and having a great desire to promote the interest of a niece of her old mistress, she takes an opportunity to try to get him into a disclosure as to the disposition of his fortune. It was very natural and proper, that he should have given that niece something : but he cuts the witness short upon

it, saying, the pew was his own. Then he tells her what legacies he had given. She presses her application in behalf of his wife's niece : but he refuses, saying, he would never alter what he had done. To all these persons therefore he distinctly speaks of having made an absolute, definitive and total, disposition ; and distinctly adds, that the object is William Lewthwaite of Broadgate. Upon this evidence applied to such a will, the will itself perhaps containing some circumstances of doubt upon the rule (but I will not take it so : I will take the rule to be as laid down for the plaintiffs) there can be no doubt ; and I feel a perfect satisfaction, that in affirming the decree I am decreeing exactly according to the intention, as expressed upon this will, which is brought before me to be construed.

1795.
CLENNELL
v.
LEWTH-
WAITE.

LEWIS v. FREKE.†

(2 Vesey Jr. 507—513.)

A power to charge a sum in gross implies a power to give any rate of legal interest ; and the rule of the Court to give 4 per cent. applies only, where no rate is specified by the party having power to fix it.

1794.
Nov. 17, 27.
Dec. 11, 13, 15.
LOUGH-
BOROUGH,
L.C.
[507]

UNDER indentures of settlement dated October 17th and 18th, 1722, John Freke in 1782 became tenant in tail of the manor and estate of Hannington in Wilts subject to a term of 500 years in trust, that the trustees should out of the rents, issues, and profits, and by granting leases for years, or by copies for lives, or mortgage, raise, levy, and pay, any sum or sums not exceeding in the whole the sum of 2,000*l.* for the benefit of the daughter and daughters and younger son and sons of William Freke the settlor, in such proportions, manner, and form, as the said William by any deed or deeds, writing or writings, to be by him executed in the presence of three or more credible witnesses, who should attest the same, should direct, limit and appoint ; and for want of such *direction, limitation and appointment, no such sum was to be raised ; and upon farther trust in the same manner to raise 3,000*l.* for the daughters and younger sons of Ralph Freke son

[*508]

† *Balfour v. Cooper* (1885), 23 Ch. D. 472, 52 L. J. Ch. 495.

1794.
LEWIS
v.
FREKE.

of the settlor, as he should appoint, and for want of appointment, 2,000*l.* and 4,000*l.* for the daughters and younger sons of William Freke grandson of the settlor, as he should appoint; and for want of appointment 3,000*l.* William the grandson by deed dated February 19th, 1782, reciting his power charged the said term with payment of the principal sum of 4,000*l.*, and directed, that the said sum should as soon as conveniently might be after his decease be raised and levied by and out of the said term and the premises therein comprised or any part thereof by the said trustees or the executors or administrators of the survivor of them, and by the rents and profits in the mean time and until the same should be raised and levied by the ways and means aforesaid, or by any other lawful ways and means, together with interest for the same at the rate of 5 per cent. from his death until the same should be fully raised, levied, and paid in manner aforesaid; and he directed, that the said sum of 4,000*l.* when raised, should be paid to his two daughters, Mary and Fanny, for and towards their portions, equally to be divided between them, share and share alike at their respective ages of twenty-one years, or days of marriage, which should first happen, together with lawful interest for the same, or such interest as the said term was subject or liable to be charged with, for their better support, maintenance, and education: provided, that if either of his said daughters should die under the age of twenty-one years and without being married, then the share of her so dying should go to the survivor for her own use and benefit.

William Freke the grandson died November 18th, 1782, leaving Mary and Fanny his only children. In 1790 Mary Freke married Edward Lewis. In 1793 the bill was filed by Edward and Mary Lewis, and on behalf of Fanny Freke, an infant, by Edward Lewis, her next friend, against John Freke as owner of the estate and representative of the surviving trustee, praying that he might be decreed to raise the sum of 4,000*l.* with interest at 5 per cent. or such other rate of interest as to the Court should seem meet; and that the money, when raised, might be paid in moieties to Edward Lewis and into the bank for the benefit of the infant. Fanny Freke afterwards married Francis Lewis;

and the suit was revived. The defendant by his answer admitted, that he was representative of the surviving trustee; and insisted, that the *plaintiffs were entitled only to 4 per cent. ; stating that he had offered and did thereby offer to raise the money with interest at that rate.

1794.
LEWIS
v.
FREKE.
[*509]

The LORD CHANCELLOR decreed, that the 4,000*l.* should be raised, and that the Master should compute interest upon it at 4 per cent. and should inquire, whether any payments had been made in respect of such interest, or any tender of interest at 4 per cent. ; and that the Master should compute interest at 4 per cent. upon such interest, or the residue thereof, in case part was paid or tendered.

Soon after this decree was pronounced a motion was made by the defendant to vary the minutes by omitting the direction to inquire, whether he had tendered 4 per cent., and to compute compound interest; and it was said, there was no charge or prayer in the bill to support that part of the decree, and that he was not representative of the surviving trustee; the admission to that effect being a mere mistake. Upon that occasion the LORD CHANCELLOR said, he had since found the case of *Boycot v. Cotton*, 1 Atk. 552, where Lord HARDWICKE raised 5 per cent. under a general charge, though upon a reversion; and laid down, that a power to charge a sum in gross implies a power to give interest.

The cause was directed to be spoken to again.

Solicitor-General, Mr. Graham, and Mr. Simeon, for the plaintiffs :

Boycot v. Cotton has established, that a power to charge in gross, implies a power to give any lawful rate of interest. The rule of this Court is to give 4 per cent., where no other rate is adopted by the party. A charge of 5 per cent. is not an improper or unfair exercise of discretion; for the party charged may get rid of it by paying the money. But if this is to be controlled, it ought to be on equitable terms. The defendant cannot now dispute the fact admitted by his answer. He ought therefore at

1794.
LEWIS
v.
FREKE.

least to pay compound interest upon 4 per cent. If he had received and laid out this money as he ought, it would have produced much more than he is now charged with at the rate of 5 per cent.

Attorney-General, Mr. Mansfield, and Mr. Cox, for the defendant :

[*510] *Boycot v. Cotton* differs from this case : the party there had power to give the whole value of the land, provided what he disposed of did not exceed 500*l.* a year ; it was therefore indifferent, whether it was given as principal or as principal with an interest. Here the author of the power limits the sum to 4,000*l.* ; the question then is, what interest the court gives in ordinary cases. Wherever the Court fixes interest upon a person not liable according to the general rule, or increases the usual rate of interest, it must be upon a case made by the bill, or in bankruptcy by petition, alleging misconduct, and including a special prayer for the special relief. The defendant is not representative of the surviving trustee. The bill does not state any particular relation, in which he stands to these parties and the estate, as a ground of relief, or pray any relief upon it. In such a case the Court ought to proceed strictly *secundum allegata et probata*. It is not sufficient, that it is stated as a mere fact, in order to make a proper party, that the defendant stands in that situation, without an allegation, that he has not done his duty. They cannot be permitted to argue now as if that fact was upon the record, as it was in *Treves v. Townshend*, 1 Bro. C. C. 384, and many cases since, in which 5 per cent. was given, not upon the rule of the Court, but because the Court would have inquired what profit the trustees had made : but they usually redeemed themselves by paying 5 per cent. The bill misleads the defendant. If misconduct in not raising this money had been charged, the defendant could have answered it by stating the doubt, which arose in the affairs of this family which was decided in *Freke v. Lord Barrington* in 1791, 3 Bro. C. C. 274, by the MASTER OF THE ROLLS ; who decreed, that this defendant was wrong in his point ; but said, there was a fair ground for litigating it ; and therefore his bill was dismissed without

costs.* Compound interest was never given, where the bill neither prayed it, nor contained a single allegation to induce the Court to construe the prayer for general relief to amount to that. They cannot have 5 per cent.; and they cannot at the hearing ask for compound interest.

1794.
LEVIS
v.
FREKE.

LORD CHANCELLOR :

[511]

Dec. 15.

I am perfectly satisfied upon considering this case, that the opinion I first entertained was a mistaken opinion. The source of my error I believe was considering the rule, that one has learnt by rote without attending to the reason of it, that 4 per cent. shall be given by this Court generally as a rate of interest; and upon the arguments, that were very ingeniously urged, I had conceived, that in the form of this power the maker of the original settlement had merely intended, that the grandson William and the son Ralph in the same manner, should have merely power to say, which of two given sums should be the sum to be raised, and that the Court would give the interest, and give it according to the course of the Court, from a mistaken idea, that in cases of powers what is left to the party is to fix the principal sum, and that the Court is to give the interest, and to give it, always implying, that it was to be given, because there is no fund for maintenance otherwise; and that it was rather the act of the Court than flowing from the power and prescribed by the party. I am perfectly satisfied, that is ill founded. Where there is a power to raise portions for children charged upon an estate, that power necessarily imports, that from the time the portion is to be raised, is payable, or vested, it is also in the discretion of the party as a necessary consequence of it to prescribe what interest shall be given, provided it does not exceed legal interest. This Court has according to my view of it, not

* The point in that cause arose upon a clause in the settlement of the Hannington estate, providing, that if William Freke the grandson, or such other person as should be entitled, should neglect or refuse within seven years after attaining the age of twenty-one years to settle another estate called Batson's to the

same uses, all the uses, estates, limitations, and appointments, subsequent to the estate for life of the said William Freke should cease. That estate not being so settled, it was contended by the defendant in this cause, that the charge of 4,000*l.* was void.

1794.
LEWIS
v.
FREKE.

[*512]

upon an arbitrary rule laid down by itself, but upon a consideration of plain and evident convenience, at a particular period fixed, that where there is a charge upon land (and afterwards it was extended, and wisely, to personal property) the interest shall not exceed 4 per cent. That was first laid down in Lord Hardwicke's time; and the ground, upon which he proceeded, is obvious and plain: he considered the portions directed to be raised as a charge upon the fund. Take it first as to real property: if it is a true proposition, that 4 per cent. is the common rate of interest at which securities stand upon land, to have allowed more would be an absurdity attended with nothing but inconvenience to both parties; for holding the legal interest to be the rate would oblige the owner to mortgage at 4 per cent. to discharge himself of the sum bearing interest at 5 per cent.; and when the money was raised, the party entitled to the charge would be at the expense of putting it *out at 4 per cent. only: the consequence therefore of the double expense, which is totally unnecessary, is saved by the Court leaving the money where it lies, and taking for it just such interest, as according to the course of the market, which is stable and not fluctuating, it would produce. I believe it was extended to personal estate in Lord Hardwicke's time; and though he laid it down and followed it according to the course of transactions prevailing at the time, when 4 per cent. was more usual than 5, and money was to be got at 4 per cent. he did not adhere invariably to that rule; for in *Incedon v. Northcote*, 3 Atk. 498, he was pressed to give a larger rate of interest. An accident had happened there, that by an evident blunder in the manner the charge was created, the eldest son came in for a share: Lord HARDWICKE determined, that the eldest son was entitled to a share: but he was pressed as to the interest; and the cause stood for decision in 1746: he allowed $4\frac{1}{2}$ per cent. upon the express ground, that the interest upon securities at that time had risen considerably: therefore he took a middle line; and gave $4\frac{1}{2}$, stating expressly, that many mortgages were at that period made at $4\frac{1}{2}$. He plainly considered, that if the money was to be raised, it would be at that expense; if to be put out again, it would be at that gain. Fortunately the state of the country has been such, that 4 per

cent. has been the usual rate at which money could be had, and therefore the rule has been adopted. It is certainly better not to let it fluctuate to any considerable degree. But in *Gwillam v. Holland*, 2 Atk. 343, it is expressly qualified by Lord HARDWICKE thus; that the course of the Court has obtained only, where no particular rate of interest is given. If the party entitled to charge, or to give interest from the time the fund is to be productive, fixes the rate, the Court cannot control it, or diminish it, if he gives more than 4 per cent. or increase it, if he gives less than legal interest. Therefore the course of the Court obtains only, where no rate is specified by him, who has a right to fix the sum, and any rate of interest he thinks proper, not exceeding legal interest.

In this case when I consider the nature of this power, and the form in which it might have been executed, it is obvious, that it was in the power of the father of the plaintiffs to have fixed it at 5 per cent.; for he has expressly by the power a right to direct the trustees to raise the money in his own lifetime. Care was taken in the creation of the power, that it should not be raised to the prejudice of the estate, while other prior charges were subsisting: the preceding charge of 3,000*l.* *in one event, and 2,000*l.* in another must first be cleared: the estate is not to be charged with the prior charges and this, both producing interest, at the same time. He might therefore have directed the trustees in his own life to have raised the 4,000*l.* by mortgage: if at 5 per cent. there could have been no cavil: it would have been a charge till the succeeding owner of the estate paid it off: if he could by raising money at 4 per cent. he might; he could not have been charged with 5 per cent. if he could get it at 4. Fixing the interest therefore at 5 per cent. does not fix upon the succeeding owner a burthen, from which he cannot discharge himself. He may pay the money: if he can upon more advantageous terms, his estate is relieved from it: if he cannot upon more advantageous terms, it is not unfair as to him, and it is fair to the children, that they should have the same interest, that any strange mortgagee would have had, if he chose to owe the money upon mortgage to a stranger rather than to the children.

It is unnecessary to enter into his conduct. I should have

1794.
LEWIS
v.
FREKE.

[*513]

1794.
LEWIS
v.
FREKE.

found difficulty in maintaining the other part of my opinion, that he should be charged with compound interest as trustee. My opinion upon the first point excludes any consideration of his conduct. He has admitted himself trustee. If the case had occurred, where the same person was both owner of the estate and trustee, I should think the Court warranted to hold, that he had received the money for the benefit of the children, and had not applied it; and the Court might act upon that. Here it is only by admission. I have read over *Freke v. Lord Barrington*. That litigation, if he was right in his point, could affect only the 1,000*l*. The 3,000*l*. the children would have been entitled to by the appointment of the maker of the settlement. I agree with the decree, that he was wrong in his point: but it was not so much without colour, that it did not give a ground to hold the affairs of this family in suspense. Therefore I do not impute to him any personal misbehaviour in not paying this money. But there must be 5 per cent. upon the other ground.

1794.
Dec. 16.
LOUGH-
BOROUGH,
L.C.

JONES v JUKES.*

(2 Vesey Jr. 518.)

Administratrix not allowed for debts paid after a decree to account; but shall stand in the place of the creditors paid.

[518]

THE bill was filed by creditors of an intestate on behalf of themselves and other creditors. After a decree directing the usual accounts and a distribution, the administratrix paid the following debts; 24*l*. for blacksmith's work; 20*l*. for rent; and 4*l*. for carriage of goods. The Master disallowed these payments; and the administratrix excepted to the report.

In support of the exception it was said, that if no debt can be paid after a decree to account, there must be a separate injunction bill against every creditor, who may think proper to sue.

LORD CHANCELLOR :

The administratrix cannot be allowed payments made after a decree to account: but in taking the account she has a right to stand in the place of the creditors she has paid.

* *In re Barrett, Whitaker v. Barrett* (1889), 43 Ch. D. 70, 74.

K. B. MICHAELMAS TERM.

JOHNSON *v.* BANN.

(4 T. R. 1—2.)

1790.
Nov. 10.

A wager is illegal when made respecting a subject prohibited by statute.

THIS action, which was brought to recover a wager of 5*l.* on the event of a horse-race, was tried at the last Chester assizes; when, it appearing that the bet had been made on a horse-race run for a prize of smaller value than 50*l.* (contrary to the statute 13 Geo. II. c. 19, s. 2), it was objected by the defendant's counsel that, as the subject of the wager was illegal, the wager itself was bad in law; and the Chief Justice of Chester being of that opinion, nonsuited the plaintiff.

Leycester now moved to set aside the nonsuit; contending, that as it was now determined, in *Good v. Elliott*,* that wagers in general were legal, unless in some particular excepted cases; and as this wager did not come within either of those exceptions, the action might be supported. It is there said that a wager is legal, unless it tend to a breach of the peace, or to immorality, or unless it affect the interest and feelings of a third person, or expose him to ridicule, or libel him, or unless it be against sound policy: now this wager is not void on either of those grounds. But

[2]

Per CURIAM :

It is sufficient, without adverting to cases, to say that the horse-race itself is prohibited by statute; and as the race, which is the subject of the wager, is illegal, so also is the wager.

Rule refused.

* 3 T. R. 693; R. R. vol. I., p. 803.

1790.
Nov. 12.

WILLIAMS v. PRITCHARD.

(4 T. R. 2—4.)

Houses, built on lands embanked from the Thames, in pursuance of 7 Geo. III. c. 37, which vests those lands in the owners, free from taxes, are not liable to be assessed to the general land-tax imposed by 27 Geo. III., though such Act is conceived in general terms, and is subsequent in point of time to the Act creating the exemption.

[3] THIS case having been argued in the previous term, the Court took time to consider, and now Lord KENYON, Ch. J. delivered the opinion of the Court :

This question depends on the exposition of the statute 7 Geo. III. c. 37, “for completing the bridge across the river Thames,” &c. the 51st section of which (after enabling private persons to enclose and embank at their own expense, under the direction of the Mayor, &c. of London) enacts, that “the ground and soil of the said river so to be enclosed and embanked in the front of every such respective wharf or ground should vest, and the same was thereby vested in the owner or owners, proprietor or proprietors, of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, free from all taxes and assessments whatsoever.” And the question is, Whether this house, which has been built on soil recovered from the river, be liable to be assessed to the land-tax levied under an Act passed since that time? It cannot be contended that a subsequent Act of Parliament will not control the provisions of a prior statute, if it were intended to have that operation; but there are several cases in the books to shew, that where the intention of the Legislature was apparent, that the subsequent Act should not have such an operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former Act, the Courts of Law, judging for the benefit of the subject, have held, that they ought not to receive such a construction. In Bro. tit. “Parliament,” 52, is this passage, “where a statute is that the merchant shall import bullion of two marks for every sack of wool exported; and then another statute was made, that the merchant should not be charged unless for the ancient custom only, this does not repeal

the first statute. *Vi. Causam, ib. 4 Ed. IV. 12.*" And the reason is, that it clearly was not the intention of the Legislature that it should have that effect. So here, though (strictly speaking) the land-tax is an annual statute, and the words of the land-tax Act, which was passed in the 27th year of this reign, are general and sufficiently large to subject these lands to the payment of the tax in question; yet, as the land-tax is one of the ways and means for raising the supplies every year, and is now become part of the constant resources of the country, the Legislature, in passing the 27 Geo. III. could not intend to repeal the provisions of the 7 Geo. III. which exempted these lands from the land-tax. Considering then that the Legislature did not mean to repeal this part of the 7 Geo. III.; considering also that this precise question *has been already determined,† we think ourselves warranted in saying, that the plaintiff is not liable to be assessed to the land-tax in respect of his house.

1790.
WILLIAMS
v.
PRITCHARD.

[*4]

Postea to the plaintiff.

DOE, ON THE DEMISE OF HENEAGE, v. HENEAGE.

(4 T. R. 13—17.)

1790.
Nov. 16.

A. devised to his son B. for life; remainder to trustees during B.'s life, to preserve contingent remainders; nevertheless to permit B. to receive the rents and profits, remainder to the first and other sons of B. in tail-male, remainder to C.; with a proviso that if B. should succeed to the estate of D. the limitation of A.'s estate to B. should cease, and the next in remainder should take as if B. were dead; B. succeeded to D.'s estate before he had a son: held that the limitation to the trustees continued during the whole of B.'s life so as to support the contingent remainders.

EJECTMENT for lands lying in the county of Lincoln, tried before Lord Kenyon, at the last Assizes, when a case was reserved for the opinion of the Court; stating,

[13]

That Thomas Heneage deceased (the late grandfather of the lessor of the plaintiff in the ejectment) being seised in fee of the premises in question, by will dated the 28th February, 1735,

† In *Ferraway v. Constable*, E. 20 decided on a special case reserved. Geo. III., this very question was

1790.
 Doe
 v.
 HENEAGE.

devised the same to his brother George Heneage, and to William Taylor, and their heirs, &c. in trust, as to part of the premises, to the use of his wife Catherine Heneage for life, in lieu of her dower; remainder to trustees for a term of 500 years, upon certain trusts which never took effect (and which term hath been since duly surrendered by the trustees); remainder as to the part before limited to the said Catherine, and also as to the parts whereof no use was thereinbefore limited, to the use of his son George Fieschi Heneage, by his first wife, for life; remainder to the use of the said George Heneage and William Taylor, and their heirs, during the life of the said G. F. Heneage, in trust to preserve the contingent uses and estates thereafter limited, nevertheless to permit the said G. F. Heneage to receive the rents, &c. thereof during his life; remainder to the use of the first and other sons of G. F. Heneage successively in tail-male; remainder to the use of the devisor's son Thomas by his then wife for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of the said Thomas Heneage (the son) successively in tail-male; remainder to the use of the devisor's third and other sons successively in tail-male; remainder to the devisor's right heirs in fee. [In which will is contained a proviso, that in case his son G. F. Heneage or any son of his should come into possession for a freehold estate of certain other property, the limitations in favour of G. F. Heneage or any son of his so coming into possession should cease, and the next in remainder should succeed as if G. F. Heneage, &c. were dead. On the death of the testator, T. Heneage, his son G. F. Heneage entered into possession of the devised estates; subsequently, but before having a son, G. F. Heneage succeeded to the other property mentioned in the proviso, and afterwards died leaving the defendant his eldest son and heir and the plaintiff his second son who claimed the devised estates under the subsequent limitations in the will.]

[15]

Coke was to have argued for the plaintiff: but

Sutton, for the defendant, was desired to begin:

* * If the limitation to the trustees had given them a

right of entry for all purposes during G. F. Heneage's life, or, as in *Nicholls v. Sheffield*,† a right of entry for the benefit of the person next in remainder, the subsequent remainders might have been supported. But here the devise to them was for a particular purpose only, which purpose was at an end before the birth of a son of G. F. Heneage; for the event of G. F. Heneage's succeeding to his uncle's estate was to have the same effect as his death * * *.

1790.
DOE
v.
HENEAGE.

LORD KENYON, Ch. J. :

[16]

This is one of those cases on which it is impossible to raise any doubt. It was owing to the anxiety of the parties at the time of the trial, and not to any doubt of my own, that this question was reserved for the opinion of the Court. The general outline of the will, stripped of technical terms, is this : The devisor, who was a younger brother, left his estate to his eldest son for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail, with a proviso that, if the larger estate should descend from the elder branch of the family to his eldest son, his own estate should go to the younger branch of his family : that event did happen, the uncle's estate descended to the devisor's eldest son. The argument now used is, that, notwithstanding such may have been the devisor's intention, he has not used proper limitations to give effect to it : and the objection is, that the particular estate having been determined before the contingent limitations could take effect, those limitations were defeated. But that objection depends on the not giving effect to one of the most important limitations in the will, namely, That to the trustees to preserve contingent remainders during the life of G. F. Heneage : Those are the common words inserted in *every limitation of this kind; and there is nothing in this will to induce us to imagine that the devisor intended that the estate limited to the trustees should not continue during the whole natural life of his eldest son. Unless therefore the defendant can obliterate those words from the will, or shew that they cannot have any effect, there is an end of his claim : but most unquestionably

[17]

1790.
DOE
v.
HENEAGE.

their estate did continue during the eldest son's life. It is not necessary to decide here who was entitled to the rents and profits after G. F. Heneage succeeded to his uncle's estate, and before he had a son born : it is sufficient for the determination of this case that the trustees had a right of entry during the whole of G. F. Heneage's life, and were to receive the rents and profits for some purpose.

† BULLER, J. and GROSE, J. of the same opinion.

Postea to the plaintiff.

1790.
Nov. 18.

[28]

MEAD v. YOUNG.

(4 T. R. 28—33.)

In an action by the indorsee against the acceptor of a bill of exchange, drawn payable to "A. or order," it is competent to the defendant to give evidence that the person who indorsed to the plaintiff was not the real payee, though he be of the same name, and though there be no addition to the name of the payee on the bill. If a bill of exchange, payable to A. or order, get into the hands of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favour it was drawn, indorse it, he is guilty of a forgery.

THIS was an action brought by the indorsee of a bill of exchange for 90*l.* against the acceptor. The bill was drawn at Dunkirk by Christian, on the defendant in London, payable "to Henry Davis, or order ;" and, having been put into the foreign mail, inclosed in a letter from Christian, it got into the hands of another Henry Davis than the one in whose favour it was drawn. The defendant accepted the bill ; and when Davis desired the plaintiff to discount it, the latter made application to the defendant to know whether or not it was his acceptance ? and, on receiving an answer in the affirmative, coupled with an assurance that it was a good bill, he discounted it, not knowing the H. Davis from whom he took it. There was no ground to impute any fraud to the plaintiff. On the trial before Lord Kenyon, after the plaintiff had proved the defendant's hand-

† Ashhurst, J., was indisposed, and unable to attend on this day.

writing, and the indorsement by Davis, the defendant offered evidence to shew that the H. Davis, who indorsed to the plaintiff, was not the real H. Davis in whose favour the bill was drawn: but Lord KENYON being of opinion that such evidence was inadmissible, the plaintiff recovered a verdict. A rule having been obtained to shew cause why a new trial should not be granted on this misdirection,

1790.
MEAD
v.
YOUNG.

[After argument:]

LORD KENYON, Ch. J.:

[29]

The question here is, Whether the name of H. Davis, to whom the bill on the face of it was payable, shall or shall not convey a title to this plaintiff who gave a valuable consideration for it, and who discounted it with the name of H. Davis upon it, and with an assurance from the defendant *that it was accepted by him? If any fraud, or even neglect, could be imputed to the plaintiff, that would vary the case: but, circumstanced as these parties were, I think that, if the plaintiff cannot recover, it will put an insuperable clog on this species of property. I cannot distinguish this case on principle from that of *Miller v. Race*† where the innocent holder of a note, which had been taken when the mail was robbed, was held entitled to recover; that indeed was a note payable to bearer; but still the same principle must govern both cases. In this case the fault originated with the drawer of the bill, in not describing more particularly the person to whom he intended it should be paid. The plaintiff was not bound to send to Dunkirk to know whether the person who had possession of the bill was or was not the real H. Davis. There may indeed be some inconvenience the other way; but setting the inconvenience on the one side against that on the other, in my apprehension, it would throw too great a burden on persons taking bills of exchange to require proof of an indorsee that the person from whom he received the bill was the real payee. Such proof has never yet been required of an indorsee in such an action: therefore I think that, as there was no fraud, or want of due diligence on the part of the plaintiff, he is entitled to

[*30]

† 1 Burr. 452.

1790.
MEAD
v.
YOUNG.

recover; however I give this opinion with some diffidence, as my brothers have intimated that they are of a different opinion.

ASHHURST, J.:

This is a case of considerable importance; and I think that we ought to grant a new trial, that the parties may have an opportunity of putting the question on the record. The present inclination of my opinion is with the defendant. In order to derive a legal title to a bill of exchange, it is necessary to prove the handwriting of the payee; and therefore though the bill may come by mistake into the hands of another person, though of the same name with the payee, yet his indorsement will not confer a title. Such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, is in my opinion a forgery; and no title can be derived through the medium of a fraud or forgery. This is distinguishable from the case of *Miller v. Race*; for there the note was payable to bearer: In such cases the bearer, who purchases for a valuable consideration, and without notice of any fraud, is entitled to receive the contents of the bill; and payment to him is a discharge to the drawer. But in this case the bill was drawn payable to H. Davis, or order; and though the name of H. Davis *were indorsed on the bill, yet it was incumbent on the plaintiff, who claims through the payee, to be satisfied that that was the indorsement of the real payee.

[*31]

BULLER, J.:

As the bill in this case is of great value, the parties may put this question in a mode to be decided by the *dernier ressort*. As at present advised, I entertain the same opinion as my brother ASHHURST. If we were to inquire whether any laches were to be imputed to the plaintiff or the drawer, I rather think the plaintiff is more in fault than any other person, in advancing his money to H. Davis, who was a total stranger to him. But, without going into any such inquiry, I am of opinion that it is incumbent on a plaintiff who sues on a bill of exchange, to prove the indorsement of the person to whom it is really payable: the

general form of the declaration shews that it is so; for that is that, "the said A. B. to whom, or to whose order, the payment of the said sum of money mentioned in the said bill was to be made afterwards, &c. indorsed the said bill, his own proper handwriting being thereto subscribed." Now here it is clear that the indorsement was not made by the same H. Davis to whom the bill was made payable; and no indorsement by any other person will give any title whatever. Then, Is there anything in this case that estops the defendant from saying that the person who indorsed to him was not the real payee? Now the act of that person who indorsed, and who in so doing was guilty of a forgery, cannot prevent an innocent person from shewing the truth. Then it was argued that Christian was guilty of negligence, in not describing more particularly the payee; but I know of no authority which requires that to be done. This bill was drawn in the common form, payable "to H. Davis or order;" and the drawer could not foresee that it would get into the possession of any other H. Davis. If any other stranger had received this bill, and indorsed it over to the plaintiff, it is not pretended that such indorsement would have conveyed any title to the bill; and it cannot make any difference whether such stranger bear the same name with the real payee or not; for no person can give title to a bill but he to whom it is made payable. Independently of these reasons, I think that convenience requires that a determination should be in favour of the defendant. I have no difficulty in saying that this H. Davis, knowing that the bill was not intended for him, was guilty of a forgery; for the circumstance of his bearing the same name with the payee cannot vary this case, since he was not the same person. Then if the plaintiff cannot recover on this bill, he will be induced to *prosecute the forger; and that would be the case even if it had passed through several hands, because each indorser would trace it up to the person from whom he received it, and at last it would come to him who had been guilty of the forgery: whereas if the plaintiff succeed in this action, he will have no inducement to prosecute for the forgery; the drawer, on whom the loss would in that case fall, might have no means of discovering the person who committed the forgery, and thus he would probably

1790.
MEAD
v.
YOUNG.

[*32]

1790.
MEAD
v.
YOUNG.

escape punishment. As far, therefore, as convenience can have any effect, it weighs strongly with me to receive the evidence. But at all events the plaintiff cannot recover, since he derives his title under a forgery.

GROSE, J. :

I am of opinion that it was competent to the defendant to shew in evidence, that the person who indorsed to the plaintiff was not the person named as the payee in this bill of exchange ; and I form that opinion as well on the substance of the transaction as on the form of pleading in such cases. A bill of exchange is only a transfer of a chose in action according to the custom of merchants ; it is an authority to one person to pay to another the sum which is due to the first, and it is generally directed to be paid to the payee or his order. When the person on whom it is drawn accepts, he only engages by the terms of his acceptance to pay the contents of the bill to the person named in it, or to his order. The general form of the declaration, which is to be found in some of the old entries, also agrees with this doctrine, and points out what the law is : I observe indeed that this declaration is not drawn in the usual form, for the words “ to whom or to whose order,” are omitted ; but still it is that the said H. Davis, that is, the same H. Davis who is mentioned in the former part of the declaration, as the payee, indorsed to the plaintiff. It clearly, therefore, appears, that as no person can demand payment of a bill of exchange but the payee, or the person authorised by him, the acceptor only undertakes to pay to them, and cannot be compelled to pay to any other person. If he pay the amount of the bill to any other person, he pays it in his own wrong, and such payment does not discharge his debt to the drawer. If this decision will prove a clog on the circulation of bills of exchange, I think it will be less detrimental to the public, than permitting persons to recover through the medium of a forgery. And that this was a forgery cannot be doubted, if we consider the definition of it ; which is, the false making of any instrument, indorsement, &c. with *intent to defraud. It makes no difference whether the person making this false indorsement were or were not of the same name with the payee,

since he added the signature of H. Davis, with a view to defraud, and knowing that he was not the person for whom the bill was intended. I agree also with my brother BULLER, that this decision will be more convenient to the public; because then the plaintiff will prosecute the person, who indorsed to him, for the forgery. For these reasons I am of opinion, that, as this bill of exchange was only payable to the payee or his order, it was competent to the defendant, the acceptor, to inquire whether the person under whom the plaintiff claims, were or were not the payee.

1790.
MEAD
v.
YOUNG.

Per CURIAM :

Rule absolute.

ROSS v. HUNTER.

(4 T. R. 33—39.)

1790.
Nov. 18.

[33]

In an action by the assured of goods against the underwriters for a loss by the barratry of the master, proof that the person who was described in the policy as master, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, is, *prima facie*, sufficient. And where the voyage insured was from Jamaica to New Orleans, which lies up the river Mississippi, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor and went up the river in his boat for a fraudulent purpose of his own, held that the dropping of his anchor with such fraudulent intent was an act of barratry.

THIS was an action against an underwriter upon a policy of insurance on goods on board the *Live Oak*, whereof was master Joseph Rati, at and from Jamaica to New Orleans. The first count in the declaration, which was in the usual form, contained an averment that the ship, "before her arrival at New Orleans, was, together with the goods, &c. by the barratry of the said Joseph Rati, he then and there being master of the said ship, &c. run away with and wholly lost to the plaintiff," &c.

There was a second count in the declaration as upon a loss by the perils of the sea.

It appeared at the trial that the *Live Oak* was put out by Rati, who acted as master, as a general ship, at Kingston in Jamaica in 1783, and that the plaintiff, amongst other persons,

1790.
 ROSS
 v.
 HUNTER.

[*34]

shipped the goods in question, which were flour and other dry goods on board her. She sailed on the voyage insured in May 1788, and arrived in June following at the mouth of the river Mississippi, which leads up to New Orleans in Spanish America, at the distance of about 85 leagues. When the captain had got thus far he dropped anchor; and went in his boat up the river to New Orleans, and on his return, without carrying the ship to her port of destination, stood away for the Havannah. *After his departure from whence, he was never afterwards heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at New Orleans; but finding it difficult to do so, on account of an interdiction against the importation of them by the Spanish government, he went to the Havannah, in quest of a market for them. Several letters were agreed to be received in evidence, which passed between the plaintiff and his correspondents; from whence it appeared that they had made every inquiry concerning Rati, but without success: and there was ground for believing that the vessel was afterwards lost. In these letters he was mentioned as the master of the vessel, and treated as one who had run away with the cargo; but whether he, or what other person, were owner of the ship did not appear. The defendant offered no evidence, but contended, that upon the plaintiff's own shewing, he could not recover; for, as to the second count, the underwriter was discharged, there having been a clear deviation proved from the voyage insured, which was admitted. And as to the first count, there was no evidence of the captain's having been guilty of barratry; for *non constat* that he was not owner or general freighter of the ship himself; or, if he were not, that he had acted contrary to the directions of the owner in going out of his original course; in either of which events he could not be guilty of barratry. But, admitting the evidence to be sufficient for that purpose, it was contended that there had been a previous deviation before the barratrous intention took effect. But Lord KENYON being of opinion that the plaintiff was entitled to recover on the first count, the jury found accordingly. The case

was argued upon motion to set aside the verdict and grant a new trial on the above facts.

1790.

ROSS

r.

HUNTER.

[After argument],

LORD KENYON, Ch. J. :

[36]

The conclusion which the jury have drawn by their verdict is, that this was barratry; and the question now is, Whether the evidence be sufficient to support that conclusion? The first point to be considered is, Whether Rati can be taken to be the owner of the ship? Now as to that he was clearly proved to be the captain; but there was no proof whatever of his being owner. And if that fact were necessary to constitute the defence of the underwriter, the affirmative proof lay upon him. If we were to infer anything, it would be the contrary, for Rati acted as captain; the letters speak of him as having been once before consigned to the house of Taylor and Montford; he is therein treated as a criminal who had run away with the ship and cargo. It is sufficient *however, to say that there was no proof of his being owner. Then the next question which arises is, Whether the ship going out of her course is to be attributed to deviation or barratry? Upon this head the question was well put at the bar, When did the barratry commence? It commenced when he first went out of the due course of his voyage, in violation of his duty; and the verdict of the jury was founded upon that ground.

[*37]

ASHHURST, J. :

The question is, Whether the plaintiff's evidence were sufficient to be left to the jury as to the barratry of the master? As to which, the fact stands simply thus: The ship in question was put up as a general ship, of which Rati was stated to be the master; that *prima facie* then supposes him not to be the owner. Then the rule of evidence applies in this case, that the affirmative is always to be proved by those whose interest it is to prove it. Here it was the plaintiff's interest to prove that Rati was the master, which he did accordingly; if, then, it were for the defendant's interest to prove that he was also owner, it was incumbent on him to shew it: but there being no evidence of

1790.
Ross
 v.
 HUNTER.

that sort, the jury did right in finding him guilty of barratry on the facts which were in evidence before them.

BULLER, J. :

Barratry is a question of law which, like other questions of law, arises out of facts, and has been well settled. In one sense of the word, it is a deviation by the captain for fraudulent purposes of his own; and that is the distinction between deviation, as it is generally used, and barratry. Then the question is, Whether the captain in this case deviated with a fraudulent view, so as to constitute barratry upon the evidence given in the cause? That will depend upon two questions; First, What it is necessary for a plaintiff to prove upon a declaration for the barratry of the captain? and, Secondly, What evidence there was in this case of fraud in the captain? 1st, it appeared that the ship had been put up as a general ship, ready to take the goods of any person to the port to which she professed to be destined; the owner of goods therefore may in such a case be supposed, in general, to be an entire stranger to the ship; he deals with the captain *quà* captain; he knows him in no other character; he acts under the information of the advertisement, which is usually put forth on those occasions, wherein Rati was in the present instance described to be master. By the terms, too, of the policy the underwriter contracted to indemnify the plaintiff against the barratry of this very man. In case then of a loss, what is incumbent on the plaintiff to prove? *He must prove the subscription of the underwriter, his own interest in the goods, his shipping them on board the vessel described in the policy, and the loss of them in consequence of such an act by the captain as amounts to barratry; that is, that he went out of the course of his voyage for a fraudulent purpose. It was not incumbent on the plaintiff to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were not the owner, it is immaterial who was. Proof of that fact, which operates in discharge of the other party, lies upon him. I agree that, if the captain had freighted the ship for the voyage, he could not be guilty of barratry; but the proof of such a fact lies equally on the defendant. It is

[*38]

then asked, why it should not be presumed that the captain went out of his course by the directions of his owner, if he had any? The reason is plain; because the Court cannot presume fraud in another person. The case put of an indictment for burglary, does not answer the purpose for which it was cited. For suppose the goods were not actually taken and carried away, observe what would be sufficient to be proved; the fact of breaking and entering the house; and whose house it was; and that it was in the night; because all these circumstances are specifically alleged in the indictment, and they are all affirmatives; then the intent with which these facts were done is equally material: but if the prosecutor prove all the former circumstances, it is a question for the jury to determine, Whether he did not enter with the view of stealing the goods, unless the party accused can shew to their satisfaction that his intent was innocent. That brings me to the next question, which, in my opinion, is the most material one here, namely, What was the view of the master when he sunk his anchor at the mouth of the river Mississippi? for if it were done with a fraudulent view, I hold that the very sinking of his anchor was an act of barratry. His intent in so doing was a question for the jury; and they have found by their verdict, that it was with the barratrous intention charged. It appears that he had some negroes on board belonging to himself, which he wished to have disposed of at New Orleans; but finding upon going up thither in his boat, that he should not be able to do so, he returned back again to his ship, and immediately sailed for another port. Then is it too much to say, that he went to New Orleans for the purpose of his own private advantage, and that the stopping the course of his ship was for a fraudulent purpose? Does it not prove clearly that when he dropped *his anchor, he did not intend going to New Orleans, unless it suited his own private advantage? The evidence, too, to be collected from the letters, shews that he was considered as a thief and criminal, and pursued as such; and that all the persons concerned treated him in the character of master only.

1790.
 ROSS
 v.
 HUNTER.

[*39]

GROSE, J. of the same opinion.

Rule discharged.

1790.
Nov. 19.

[39]

DOE, ON THE DEMISE OF WILLIS AND OTHERS, v.
MARTIN AND OTHERS.

(4 T. R. 39—71.)

By a marriage-settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, &c. as the husband and wife should appoint; and for want of such appointment, to the use of all and every the child or children, equally, if more than one, as tenants in common; and if but one, then to such only child, his or her heirs or assigns for ever; remainder over; it was held, that the remainder to the children was a vested remainder in fee in each child when born, liable, however, to be divested by an appointment by the parents;* and consequently (no appointment having been made) that the remainder to the children became absolutely vested. Where the settlement contained a power for the tenants for life to revoke the uses, and for the trustees to sell and convey to the purchaser, "so as that the purchase-money should be paid into the hands of the trustees, and not into the hands of the tenant for life, to be laid out by the trustees in the purchase of other estates to the same uses:" a purchaser to whom the legal estate was conveyed in due form, but without the purchase-money having been in fact paid to the trustees, or duly re-invested, did not acquire a good title against the persons entitled under the original uses.

THIS was an ejectment for some premises in the Isle of Wight, on the joint and several demises of Richard Legg Willis, James Willis, Bethia Ann Willis, and Mary Willis, and on the trial at the Summer Assizes at Winchester, 1789, before Buller, J. a special verdict was found, stating in substance as follows :

That Bethia Legg, being seised in fee of the premises in question, on her intended marriage with Richard Willis, by deeds of lease and release, dated the 14th and 15th of February, 1757, between Richard Willis of the first part, Bethia Legg of the second part, and Peter Bracebridge and Robert Willis of the third part, conveyed to Bracebridge and Robert Willis and their heirs to the use of herself in fee till marriage, and afterwards, to her sole and separate use for life, without impeachment of waste, and not to be subject to the control or debts of her husband; remainder to the use of Richard Willis for life, without impeachment of waste; remainder to the use of all and every the child

* This principle referred to as (1866), L. R. 2 Eq. 151, 155, 35 settled law in *Lambert v. Thwaites* L. J. Ch. 406.

or children or such of them of Richard Willis and Bethia for such estates and interests, &c. and in such parts, shares, and proportions as Richard Willis and Bethia should by deed *appoint, and for want of such appointment, then to the use of the child or children of Richard Willis and Bethia in such parts, shares, and proportions, and for such estates and interest, as the survivor of them should by deed or will appoint; and for want of such appointment, then to the use of all and every the child or children equally, share and share alike, to hold the same; if more than one, as tenants in common, and not as joint tenants; and if but one child, then to such only child, his or her heirs or assigns for ever; and in default of such issue, then to the use of the survivor of Richard Willis and Bethia in fee. The deed contained a proviso: That in case the said Richard Willis and Bethia, his intended wife, or the survivor of them, should at any time thereafter be desirous to make sale of the said manor, &c. or any part thereof, then and in such case it should and might be lawful to and for the said Richard Willis and Bethia, his intended wife, or the survivor of them, at any time or times thereafter, by any writing or writings to be signed or sealed by the said Richard Willis and Bethia, his intended wife, or the survivor of them, to revoke and make void all and every or any the use and uses, trust or trusts, estate or estates, therein respectively before limited, and declared of and concerning the said manor, &c. with the appurtenances; and for the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs and assigns, to sell and dispose of the same, for the best price that could or might be had or gotten for the same, and convey the same to a purchaser thereof, "so as that the purchase-money thereof should be paid into the hands of the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs and assigns, and not into the hands of the said Richard Willis and Bethia, his intended wife, or either of them, to be laid out and invested by the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs or assigns, in the purchase of other freehold messuages, lands," &c. at the request of the said Richard Willis and Bethia, his intended wife, or the survivor of them, to be settled to the same uses, trusts, intents, and purposes, as were therein before limited, &c.

1790.
 DOR
 V.
 MARTIN.
 [*40]

1790.
Nov. 19.

[39]

DOE, ON THE DEMISE OF WILLIS AND OTHERS, *v.*
MARTIN AND OTHERS.

(4 T. R. 39—71.)

By a marriage-settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, &c. as the husband and wife should appoint; and for want of such appointment, to the use of all and every the child or children, equally, if more than one, as tenants in common; and if but one, then to such only child, his or her heirs or assigns for ever; remainder over; it was held, that the remainder to the children was a vested remainder in fee in each child when born, liable, however, to be divested by an appointment by the parents;* and consequently (no appointment having been made) that the remainder to the children became absolutely vested. Where the settlement contained a power for the tenants for life to revoke the uses, and for the trustees to sell and convey to the purchaser, "so as that the purchase-money should be paid into the hands of the trustees, and not into the hands of the tenant for life, to be laid out by the trustees in the purchase of other estates to the same uses:" a purchaser to whom the legal estate was conveyed in due form, but without the purchase-money having been in fact paid to the trustees, or duly re-invested, did not acquire a good title against the persons entitled under the original uses.

THIS was an ejectment for some premises in the Isle of Wight, on the joint and several demises of Richard Legg Willis, James Willis, Bethia Ann Willis, and Mary Willis, and on the trial at the Summer Assizes at Winchester, 1789, before Buller, J. a special verdict was found, stating in substance as follows:

That Bethia Legg, being seised in fee of the premises in question, on her intended marriage with Richard Willis, by deeds of lease and release, dated the 14th and 15th of February, 1757, between Richard Willis of the first part, Bethia Legg of the second part, and Peter Bracebridge and Robert Willis of the third part, conveyed to Bracebridge and Robert Willis and their heirs to the use of herself in fee till marriage, and afterwards, to her sole and separate use for life, without impeachment of waste, and not to be subject to the control or debts of her husband; remainder to the use of Richard Willis for life, without impeachment of waste; remainder to the use of all and every the child

* This principle referred to as (1866), L. R. 2 Eq. 151, 155, 35 settled law in *Lambert v. Thwaites* L. J. Ch. 406.

or children or such of them of Richard Willis and Bethia for such estates and interests, &c. and in such parts, shares, and proportions as Richard Willis and Bethia should by deed *appoint, and for want of such appointment, then to the use of the child or children of Richard Willis and Bethia in such parts, shares, and proportions, and for such estates and interest, as the survivor of them should by deed or will appoint; and for want of such appointment, then to the use of all and every the child or children equally, share and share alike, to hold the same; if more than one, as tenants in common, and not as joint tenants; and if but one child, then to such only child, his or her heirs or assigns for ever; and in default of such issue, then to the use of the survivor of Richard Willis and Bethia in fee. The deed contained a proviso: That in case the said Richard Willis and Bethia, his intended wife, or the survivor of them, should at any time thereafter be desirous to make sale of the said manor, &c. or any part thereof, then and in such case it should and might be lawful to and for the said Richard Willis and Bethia, his intended wife, or the survivor of them, at any time or times thereafter, by any writing or writings to be signed or sealed by the said Richard Willis and Bethia, his intended wife, or the survivor of them, to revoke and make void all and every or any the use and uses, trust or trusts, estate or estates, therein respectively before limited, and declared of and concerning the said manor, &c. with the appurtenances; and for the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs and assigns, to sell and dispose of the same, for the best price that could or might be had or gotten for the same, and convey the same to a purchaser thereof, "so as that the purchase-money thereof should be paid into the hands of the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs and assigns, and not into the hands of the said Richard Willis and Bethia, his intended wife, or either of them, to be laid out and invested by the said Philip Bracebridge and Robert Willis, or the survivor of them, his heirs or assigns, in the purchase of other freehold messuages, lands," &c. at the request of the said Richard Willis and Bethia, his intended wife, or the survivor of them, to be settled to the same uses, trusts, intents, and purposes, as were therein before limited, &c.

1790.
 Doe
 v.
 MARTIN.
 [*40]

1790.
DOE
v.
MARTIN.

[*41]

It was also provided, that the trustees might invest the purchase-money in Government or other securities in their names, and pay over the dividends to the persons who would have been entitled to the profits of the real estates. And for the security of the purchaser of the estate, it was agreed that the payment of the purchase-money unto the trustees, &c. should discharge such purchaser, notwithstanding any loss or *misapplication that might happen to such purchase-money. [The marriage took place, and subsequently, there being children of the marriage (who were the lessors of the plaintiff) Richard Willis contracted for the sale of the property to Martin, through whom the defendant claimed title; and fraudulently contrived, with the assistance of an attorney who acted for the purchaser as well as for him, that the purchase-money should be paid to him, Richard Willis, who converted the same to his own use. By the conveyance to the purchaser, the uses were revoked in accordance with the settlement; but, it being considered that the legal estate would revert to the heir of the survivor of the trustees, who was an infant; proceedings were taken by petition in Chancery to have the infant declared a trustee under the Act 7 Ann. c. 19, and to have a conveyance directed accordingly. These proceedings were carried out by the attorney above mentioned; and although the order directed the payment of the money to the executors of the surviving trustee, to be by them invested according to the trusts of the settlement, the money was not in fact paid to them, nor was it ever so invested. The purchaser was not intentionally a party to the fraud.

The case was argued at considerable length, and this day the Court gave judgment as follows:]

[63] LORD KENYON, Ch. J.:

The principal question in this case is, Whether the remainders to the children of Robert and Bethia Willis were vested or contingent? If the latter, it cannot be disputed, but that the destruction of the particular estate on which they depended, before they became vested, would destroy them. One argument which has been used is, That the estate limited to the trustees was an use executed in them; for that otherwise the estate limited

to the wife for her sole and separate use would not be secured to her, but be under the husband's control. But in answer to that, it is sufficient to observe, that it is limited to the trustees, without saying "to and to the use of the trustees." If none of the limitations of the settlement could possibly take effect without this construction, *I should be inclined so to decide it; as was done some years ago in a case in the House of Lords. But that is not the case here; for this estate was limited to Bethia Willis and to her heirs, until the marriage should be solemnized: it was therefore intended that the legal estate should not be taken out of her unless the marriage took effect. Besides, the Court of Chancery would consider the husband, if it vested in him, a trustee for the wife; so that she might have all the benefit intended by the marriage-settlement. If the remainders to the children of R. and B. Willis were contingent, the objection made by the defendants, that the conveyance by Willis and his wife, and the fine, by destroying the particular estate before they vested, also destroyed those remainders, must prevail; for it is too late, as the law now stands, to say that such is not the established doctrine of contingent remainders. This doctrine indeed involves in it difficulties which have been frequently felt by wise and able lawyers, who have wished to break through the rule: but they have been deterred from the attempt by the consideration of the consequences that might possibly ensue. There are two instances, it is true, where the law is otherwise: in equitable estates, where the contingent remainders are not destroyed, because the estate is vested in trustees to preserve the contingent remainders; and in copyholds, where the estate in the lord of the manor will support all the remainders: but in the case of freehold estates of inheritance, the rule is so established that it is not now to be shaken. On the first question in this case, our judgment must depend on the authorities cited: the three leading of which are *Lovie's case*, *Walpole v. Lord Conway*, and *Cunningham v. Moody*. Of the first, inserted in Rolle's Abridgment, which was published under the inspection of Sir M. Hale, it is sufficient to say, that it was held in a case circumstanced like the present, that the remainder was contingent. This was also adopted in a great measure by Lord HARDWICKE, in *Walpole*

1790.

DOE

v.
MARTIN.

[*64]

1790.
DOE
v.
MARTIN.

[*65]

v. *Lord Conway*. But I am happy to find that, in the last of those cases, *Cunningham v. Moody*, where the same point arose, and where Lord HARDWICKE had an opportunity of reconsidering this question more fully, and at a time of life when his judgment was more mature, that great judge determined differently: and I cannot find any substantial distinction between that case and the present. There Lord HARDWICKE (after saying that the fee was not in abeyance) added, "nor does the power of appointment make any alteration therein; for the only effect thereof is, that the fee which was vested was thereby *subject to be divested if the whole were appointed." Now in this case the limitations to the children were first subject to a power of appointment, but for want of such appointment to the children in fee (I say in fee, as I shall shew in the course of my opinion). And whether the limitations precede or follow the power of appointment, it makes no difference. The object of the parties here was to make the whole estate subject to the power and will of the parents, according to the situation and exigencies of the family. I therefore say, in the words of Lord HARDWICKE in *Cunningham v. Moody*, that the fee was vested in the children, subject, however, to be divested by the execution of the power of appointment. The opinion of Lord HARDWICKE in the latter case is peculiarly deserving of attention, because when it was discussed, the former one of *Walpole v. Lord Conway*, where he had intimated a different opinion, was strongly pressed upon him, and because too he decided the last case at a time when he had the assistance of some of the most eminent lawyers who ever attended the bar of that Court. I cannot therefore forbear thinking that, on the authority of that case, we ought to decide that the remainders to the children were vested, subject nevertheless to be divested by the parents executing the power of appointment. No appointment has been made; and therefore at the time when the acts stated in the verdict were done by the parents in opposition to the interest of their children, the limitations to the children were not destroyed. This decision puts an end to this cause as far as respects all the children but one: but it has been contended that they only took estates for life, and that one being since dead, the reversion in fee of the parents immediately came into possession.

And that brings me to the next question, Whether the children took estates for life or in fee, which arises on these words: "And for want of such appointment, then to the use of all and every the child or children equally, share and share alike, to hold the same, if more than one, as tenants in common, and not as joint-tenants; and if but one child, then to such only child, his or her heirs or assigns for ever:"—and the question is, Whether the words "his or her heirs" may not with propriety, and ought not, considering the whole settlement and the manifest intention of the parties, to act as words of limitation on all the preceding words in the sentence? I cannot bring myself to doubt but that they may. By putting the stops, or using the parenthesis, as pointed out by the plaintiff's counsel, it becomes perfectly clear: and we know that no stops are ever *inserted in acts of parliament, or in deeds; but the Courts of Law, in construing them, must read them with such stops as will give effect to the whole: if then we use the points suggested by the counsel, the clause will read thus: "To the use of all and every the child or children equally, share and share alike, his or her heirs or assigns for ever." If this had been like the case of *Hay v. Lord Coventry*,† we might have lamented that the parties had not inserted words of inheritance to carry their probable intent into execution; but we could not have supplied them. But in this case there are words of inheritance; and I think we should defeat the manifest intention of the parties and the object of the settlement, which was to give the children estates of inheritance, were we not to read this part of it in the manner contended for by the plaintiff's counsel.

Then it has been argued, that the rights of the children, whatever they were, were subject to the power of revocation by the parents; and that the deed of revocation, standing *per se*, and taken separately from the conveyance to Martin, defeated their rights: but I am most clearly of opinion, taking the whole of the power together, that that deed was no legal revocation. They had only a power to revoke, on condition of re-investing the money in the purchase of another estate for the benefit of their children. And it would be strange to say, that any interval might happen

1790.
DOE
v.
MARTIN.

[*66]

1790.
DOE
v.
MARTIN.

[*67]

between the sale and purchase of that other estate ; it was all to be considered as one deed and one act. And though the purchase-money need not have been re-invested immediately, yet it was to lie in the hands of the trustees in the meantime, until a proper opportunity should offer of so re-investing it. But it is said, that the transaction as far as Martin was concerned, was fair and honourable, and that the fraud only consists in the misapplication of the purchase-money : but, without imputing any fraud to Martin, and indeed it is negatived by the verdict, the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails both in Courts of Law and Equity ; and therefore, whatever misconduct and fraud are imputed to Cruttenden by the verdict, it must affect his principal, Martin. Now the conduct of Cruttenden in this transaction is too infamous to be stated. Nothing can be clearer than that this was not a case within the statute of Anne. At present we are not called upon to decide what was the effect of what was done by the Lord Chancellor, or how far we, sitting in a Court of Law, can investigate what was done there ; for this case does not depend upon that inquiry ; the subsequent proceedings put it out of all doubt. We must remember that the power of revocation was restrained so as that the purchase-money should be paid into the hands of the trustees (and not into the hands of R. and B. Willis) and by them laid out and invested in the purchase of other freehold estates ; the whole therefore was considered as one transaction. Now, in order to comply with this requisition, that was done in point of form, but not in substance ; for it is expressly stated in the verdict that the draft was delivered by Cruttenden, for form's sake, to R. and M. Willis, and by them to R. Willis, the infant trustee, for form's sake, and then taken from him who ought to have applied it, and put into the hands of that very person of whom the settlers were jealous, and to whom they had expressly directed that it should not be paid ; and in truth it never was applied to the purposes of the settlement. This then was a gross rank fraud, which contaminates the whole transaction, and renders it absolutely void, as well in a Court of Law as in a Court of Equity. Therefore the lessors of the plaintiff are entitled to recover to the full extent.

ASHHURST, J. :

The general question on the whole of this case is, Whether the persons conveying had a right to convey the estate in question? for if not, however fair the transaction may have been on the part of the purchaser, the defendants cannot retain; but the legal title must prevail, without considering the hardship of their case. In order to determine this, the first consideration is, Whether the lessors of the plaintiff had a vested interest, and what was the *quantum* of that interest? and, secondly, Whether any acts have been done to divest them of that interest? As to the first, I am of opinion that the limitations to the children were vested. The authorities on this point cannot indeed be reconciled: *L. Lovie's* case is rather against this opinion; but the latest authority, that of *Cunningham v. Moody*, which appears to have been very well considered by Lord HARDWICKE, seems decisive. The facts in that case do not materially differ from those in the present: and the principle of it is immediately applicable. Then the limitations to the children became vested on their birth, subject however to be divested by the appointment. As to the quantum of estate which those children took, I think they took a fee; for it is doing no great violence to the construction of the limitation to them to say, that the words "his or her heirs, or assigns, for ever," apply to the words in the former branch of the clause, by leaving the intervening *words in a parenthesis. With respect to the second question, Whether their interests were divested by the acts stated in the verdict? that could only be done by a due execution of the power of revocation; a bad execution has no operation whatever. Now I consider this power not an absolute but a conditional one; for it is so as that the purchase-money be paid into the hands of the trustees, and not into the hands of R. and B. Willis, and be laid out in the purchase of other lands. Two conditions were therefore annexed to the execution of the power; the one, that the money be paid into the hands of the trustees; the other, that it be laid out in the purchase of other lands, and settled to the same uses. Now neither of those has been complied with; and consequently the deed of revocation is a mere nullity, and does not divest the estates limited to the children. If we were to enter into the ques-

1790.

DOE
v.
MARTIN.

[*68]

1790.
DOE
v.
MARTIN.

tion of fraud ; to be sure a more gross and infamous fraud never appeared on the records of the Court, than that which was practised by the agent of the purchaser, and for which the principal is responsible ; but the determination of the two first points render this inquiry quite unnecessary.

BULLER, J. :

This case has been so fully discussed, both on the bench and at the bar, that I will content myself with stating the general grounds of my opinion. On the question relative to the power of revocation, little remains to be said : that the revocation was fraudulent is clear, for the reasons given by my Lord. It was the object for the settlers to settle the money arising from the sale of the estate, on other estates to the same uses, if it could be done with advantage. The power of revocation was conditional only ; the money was to be paid into the hands of the trustees on condition and for the express purpose of thus settling it : but that condition not having been complied with, the deed of revocation is void.

With respect to the first and principal question, the argument on the part of the defendants, as far as authorities are concerned, rests on *L. Lorie's* case, and on that of *Walpole v. Lord Conway*. But what was said by Lord COKE in the former case, certainly did not apply to the point before the Court ; the question there arose on the will only ; and nothing was said either in argument or by any other of the judges on the construction of the deed. The same case is also reported in Moor 772 ; where it appears that the remainder under the will was contingent, because it could not arise unless the eldest son died without issue, and there was also an alienation. Therefore I think it did not occur to Lord COKE that a remainder, when once vested, could be afterwards divested by the execution of the power. If there were no authority against this case, I could not have made up my mind to agree to it : but his opinion has been since controverted in other cases. In 2 Lord Raym. 1150, Mr. J. POWELL, speaking of *L. Lorie's* case, said, “ Though it was a doubt in *L. Lorie's* case, whether a remainder could be limited after a contingent fee, yet it is none now. And therefore if a fee-simple be limited

to such persons as A. shall appoint by his will, remainder over, that is a good remainder vested till the appointment." Now the instance there put is directly this case; and if the limitations to the children were vested on the birth of a son, nothing has since happened to divest them. The defendant's counsel have rather hinted at, than insisted on, a difference between this case and that put by one of the plaintiff's counsel, of a remainder to the first and other sons of A. with a remainder to the first and other sons of B. his brother; where, on the birth of B.'s son before A. had any son, the remainder would vest in the former, subject to be divested on the birth of a son of A.: but I see no distinction; for when a child of Robert and Bethia Willis was born, the limitation was vested in him exactly in the same manner as if the limitation had been to their first and other sons. If there had been no power of appointment, the limitation to the children would have vested on the birth of a child: that was the point decided in *Lewis Bowles's* case. Then suppose the limitation to the children had been followed by a proviso containing a power of appointment, that would not have varied the case: if so, what difference is there, either in reason or in law, whether the power of appointment be inserted in one part of the instrument or the other? The Court must consider the whole deed together, in order to collect the intention of the parties. As to the quantum of interest which the children took, that question also seems equally clear. Suppose the limitation were to "all and every the children, and his or her heirs and assigns for ever;" that would not be grammatically written; but, the intention of the parties being manifest, the Court must read it thus: his, her, or their heirs and assigns for ever. This question arises on a family settlement, which was made for the benefit of all the children of the marriage; and in order to give effect to the intention of the parties, we may leave the intervening words in a parenthesis, by which *means the word "heirs" will have relation to the words in the former part of the sentence.

1790.

DOE
v.
MARTIN.

[*70]

GROSE, J. :

If my brother BULLER found the case so much exhausted as to make it unnecessary for him to go fully into every part of it,

1790.
DOE
v.
MARTIN.

much less necessary is it for me to do so. The first considerable question is, Whether the remainder to the children, which was certainly contingent in its creation, did or did not become vested in the children as they came *in esse*? I confess I was at first forcibly struck with *L. Lovie's* case, and *Walpole v. Lord Conway*, as also with the common definition of a contingent remainder. But I think that the rule laid down in *Cunningham v. Moody* is the best and wisest construction; and there the rule is, "that a remainder may vest liable to be divested by the execution of a power of appointment." The ground of it is, that the Courts will never suffer the fee to be in abeyance but from necessity. And I am the more inclined to adopt this rule, as being the most likely to give effect to the intention of the parties; which the contrary doctrine would probably defeat. Therefore I think that on the birth of the children the limitations to them became vested: and as to the quantum of estate which they took, I have not a particle of doubt. By reading the words in the mode adopted by the Court, all the difficulty is removed. With respect to the execution of the power of revocation; I cannot read it without seeing what was the plain intention of the parties to the settlement. It was to enable the husband and wife to revoke the former uses, and the trustees to sell the estate, so as that the money should be paid to the trustees, and be by them applied in the purchase of other estates to the same uses. This then I consider only a partial power of revocation, which was given to them only for the purpose of effectuating the other part of the power, that of investing the money in other lands more beneficially for the children; and the whole must be taken together. It is admitted that some part of the transaction was fraudulent: but it is argued that the different parts of the transaction may be considered separately from the rest, and that the fraud consists, not in the revocation, but in the subsequent misapplication of the money. But I think that the fraud was in the conveyance, which was made with an intent not to apply the money as directed by the settlement, but to pay it into Willis's hands. This was merely a conditional power, which must be considered *altogether; and no part of the execution of it can be good, unless the whole be so.

[*71]

Judgment for the plaintiff.

HOBSON v. TODD.

(4 T. R. 71—75.)

1790.
Nov. 20.

[71]

One commoner who has surcharged, may nevertheless maintain an action against another for surcharging the common.†

THIS was an action on the case, by one commoner against another, for surcharging the common. At the trial at the last Durham Assizes before Thomson, Baron, the plaintiff proved *the fact of the defendant's having surcharged; but it appearing that the plaintiff had also surcharged to a greater amount than the defendant, the plaintiff was nonsuited.

[*72]

On a former day in this Term, a rule was obtained to shew cause why the nonsuit should not be set aside, and a new trial granted, because one tort could not be set off against another; against which

[*Cockell*, Serjt. and *S. Heywood*, having shewn cause],

Law, *Chambre*, and *Park*, in support of the rule, were stopped by the Court.

[73]

BULLER, J.: ‡

It does not seem to me that the plaintiff has sustained any very serious injury; but the question here is, Whether or not the plaintiff be entitled to a verdict?—the question relating to the damages, is for the consideration of the jury. It has been said by one of the counsel, that the plaintiff must prove a serious injury, relying on the words of Mr. J. BLACKSTONE, in the case cited. But the expression used by that Judge does not warrant such a construction; for it must be taken with a reference to the case then before him, in which the plaintiff did not appear to have been much injured; for it did not appear that he was possessed of a single beast which he could have put on the common. I lay therefore that part of the argument out of the

† *Pindar v. Wadsworth*, 2 East, L. J. Ch. 553.

154; *Robertson v. Hartopp* (1889), 43 Ch. D. 484, 500 (per Stirling, J.), 59

‡ Absent, Lord Kenyon, Ch. J. and Ashhurst, J.

1790.
HOBSON
v.
TODD.

[*74]

question ; for a small injury is so indefinite in its nature, that it affords no rule by which the mind can be guided. The only question then is, Whether any injury has been done by the defendant to the plaintiff? If the defendant had turned the supernumerary cattle on the common, by the licence of the lord, I admit that the plaintiff could not have maintained this action, because the defendant would not have been a wrong-doer : but here is a wrong-doer ; and the plaintiff is entitled to an action, without proving any specific damage. This depends on the form of the declaration, and on what has been considered as proof of it. The allegation is, That the plaintiff could not, by reason of the defendant's act, enjoy his common in so ample and beneficial a manner as he used to do. Now, if the defendant's supernumerary cattle had not been on the common, the plaintiff's cattle might have eaten every blade of grass which was consumed by the defendant's : that, therefore, is an injury to the plaintiff. There is also another ground on which this action may be supported, which is, that the right has been injured ; and if a commoner cannot bring such an action as this, *because his cattle had grass enough to prevent them from starving, he must permit a wrong-doer, like the defendant, to gain a right by the length of possession. This opinion is fortified by what fell from Lord Ch. J. DE GREY, in the passage alluded to, who said that this action was introduced in lieu of the old writ of admeasurement of pasture. By that mode of proceeding, if the defendant put more cattle on the common than he ought, the plaintiff was entitled to have a certain quantity admeasured to the defendant ; the excess then is the injury in these cases : and the plaintiff having also surcharged, makes no difference in this action : for one tort cannot be set off against another. Here the plaintiff has proved the whole of his declaration, by proving his right to the common, and that the defendant put on it more cattle than he had a right to do ; and whether the plaintiff exceeded his right or not, makes no part of the issue which the jury were to try. The issue is, Whether the defendant has been guilty of any wrong?—and, Whether the plaintiff has been injured by it in the smallest degree?—and I am clearly of opinion that he has.

GROSE, J. :

I am not inclined to encourage this action on any other ground than that mentioned by my brother BULLER, namely, That if A. infringe the right of common of B. it is necessary that B. should have A.'s right ascertained; otherwise his wrongful act would in process of time become evidence of his right. If we were not to set aside this nonsuit, it would be holding forth this doctrine to the public: that if one commoner, who happened to surcharge in a small degree, were injured in his right of common, he could not maintain an action against another who surcharged to a much greater degree: but that might be productive of the most mischievous consequences to all those persons who have rights of common. But my opinion is, That it is no objection to a commoner bringing such an action as this, that he himself has surcharged the common, though each person ought to recover damages in proportion to the injury which he receives. In practice I never recollect it being made a matter of inquiry, as an objection to the action, Whether or not the plaintiff himself had surcharged?—which I take for granted was because such an inquiry was immaterial. If this plaintiff has surcharged, he is liable to an action by any other commoner; but that is no objection to his suing the defendant, who is a wrong-doer; and it does not estop the plaintiff from shewing that he is injured. Therefore I am of opinion, That the rule for setting aside the *nonsuit, and for granting a new trial, should be made absolute, though it is for the plaintiff's consideration whether or not it be worth his while to proceed any further.

Rule absolute.

1790.

HOBSON
v.
TODD.

[*75]

DOE d. BLANDFORD v. APPLIN.

(4 T. R. 82—89.)

Under a devise to "A. for life and after his decease to and amongst his issue, and in default of issue," then over, A. takes an estate tail. In order to give an effect to the deviser's general intent, a Court will overlook a particular intent inconsistent therewith.†

[EJECTMENT, in which the question of title arose as follows]:—
A. Dymock, being seised in fee of the premises in question, by

† See cases discussed in *Allgood v. Blake* (1872) L. R. 7 Ex. 339, 353.

1790.

Nov. 23.

[83 :

1790.
DOE
v.
APPLIN.

will dated 29th August, 1758, devised as follows: "I give and bequeath unto my nephew William Dymock, all that my freehold estate that I bought of Mr. Kingstone, situate at Alhampton, in the county aforesaid, to hold to him during his natural life, and after his decease to and amongst his issue; and in default of issue, to be divided between my nephew Elias Dymock, and my niece Mary Dymock, and to their heirs and assigns for ever." [A. Dymock the devisor, died in 1758; whereupon William, the nephew, entered into the premises, and in Michaelmas Term, 1759, suffered a recovery, upon which the defendant's title was founded. The plaintiff claimed title deduced from Elias Dymock and Mary Dymock mentioned in the will.]

[After argument] :—

[87] LORD KENYON, Ch. J. :

Although this will is very inaccurately drawn, I think we may collect the devisor's general intention from the words of it. The great question in this case is, What estate W. Dymock took under the will? In the first clause the estate is expressed to be given only during his natural life; but in the next limitation it is to go to his issue; and in default of issue only, was it to go over. It is clear, therefore, from the whole of the will that the devisor did not intend that it should go over to those in remainder, until after a general failure of issue in W. Dymock. Now I think we are warranted by many determinations, and particularly by that of *Robinson v. Robinson*,† to give that effect to the will which will best answer the devisor's general intention, though by so doing we may defeat some particular intent. Here the general intent was, That W. Dymock and his issue should take first: then what construction will best effectuate that intention. It has been argued by the plaintiff's counsel, That W. Dymock took only an estate for life, and his children an estate-tail: but it would be difficult to put two different interpretations on the word issue; and, even if that could be done, it would not further the intention of the devisor in this case; for there are no cross-remainders to the children, and they can never be implied; so that, according to

† 1 Burr. 38.

the construction contended for, if one of the children died, his share would go over to those in remainder, in prejudice of those children who survived ; which was certainly not intended by the devisor. Therefore, we shall best answer his general intent by saying, That W. Dymock took an estate-tail ; and, in so determining, we shall not go farther than has been done in other cases ; especially in *Robinson v. Robinson*, where the estate was expressly given to L. Robinson for life, and no longer ; and after his decease, to such son as he should have, taking the name of Robinson ; and for default of such issue then over. There, notwithstanding the devisor said in express terms that L. Hicks should only take for life, and no longer, this Court were of opinion, That, in order to effectuate the manifest general intention of the *devisor, he must, by necessary implication, take an estate tail. It is not necessary to go through all the cases on this subject, which are for the most part collected in *Robinson v. Robinson* ; in addition to which is *Dubber v. Trollop*, 8 Vin. Abr. 233 ; but the result from them all is, That the Court is to put such a construction on the whole of the will as will best effectuate the general intention of the devisor, contrary to one of the limitations, if a different construction will defeat the general intent. Then, according to that principle, I think that in this case W. Dymock took an estate-tail ; and, consequently, that the remainders were barred by the recovery.

1790.
DOE
v.
APPLIN.

[*88]

BULLER, J.† :

I am not inclined to differ from my Lord in the construction which he has put upon this will, though I think by so doing we shall go farther than has ever been done in any of the former cases ; because, in order thus to construe the will, we must reject the words “ and amongst.” But if we were to give effect to those words, it would defeat the general intent of the will, which will be better effected by giving an estate-tail to W. Dymock ; for the devisor certainly intended to prefer all the issue of W. Dymock before the more distant branches of the family ; which would not be the case, as there are no cross-remainders, unless W. Dymock took an estate-tail. The word “ issue ” may mean

† Mr. Justice Ashhurst was absent.

1790.
DOE
v.
APPLIN.

children, or heirs of the body ; but it is too much to say that it means children in this will, for then grandchildren would be excluded ; and the next clause, “in default of issue” could not have any effect at all. It therefore must mean “heirs of the body.” Therefore, I think that, as by rejecting the words “and amongst,” the general intent of the devisor will be best effectuated, we are warranted in rejecting them.

GROSE, J. :

[*89]

Upon the mere words, I should think that W. Dymock took only an estate for life ; and yet, if we were to put that construction on the will, it would defeat the general intention of the devisor, which can only be carried into effect by considering “issue” as a word of limitation. There is no case in which “issue” has been determined to be a word of purchase, unless coupled with other words expressing such an extent ; but here the contrary intent appears. Mr. J. RAINSFORD, in Finch 282, arguing upon the distinction between issue and children, said, “The word issue is, *ex vi termini, nomen collectivum*, and takes in all issues to the utmost extent of the family, as far as the words heirs of the body would do ;” and *he observed, That it was resolved in *Wild’s* case, 6 Rep. 17, “that a devise being to the father and mother, and after their deaths to the children, the word children shall be a name of purchase, and not of limitation, and they shall have but an estate for life ; but had it been to their issues (as in the case then before him), that word issues would have been construed a word of limitation, and not of purchase ; and so it was lately resolved in the Exchequer Chamber ; and a judgment given in the King’s Bench to the contrary was reversed, upon the authority of *Wild’s* case.” That case is strong to shew that issue is a word of limitation, and not of purchase ; and that it is different from children : and as the devisor’s intent in this case will be best effectuated by determining that W. Dymock took an estate-tail, that is the best and most legal construction of this will.

AURIOL *v.* MILLS.1790.
Nov. 23.
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IN ERROR.

(4 T. R. 94—100.)

A person who enters into an express covenant in a lease, continues liable on his covenant although the lease is assigned over.

[THIS case has no importance for modern purposes, except for the following observations of]

LORD KENYON, Ch. J. :

[98]

* * * It is extremely clear, that a person who enters into an express covenant in a lease, continues liable on his covenant notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant, which was taken in early times, is equally clear: if the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears by the authorities that an action of debt will not lie against the original lessee; but all those cases with one voice declare, that if there be an express covenant, the obligation on such covenant still continues. And this is founded *not on precedents only, but on reason; for when a landlord grants a lease, he selects his tenant; he trusts to the skill and responsibility of that tenant; and it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object, as in the case of an execution. In such a case the lessor has no choice of the under-tenant: So here the assignees are bound to sell the term, and perhaps they may assign to a person in whom the lessor has no confidence. * * *

[*99]

K. B. HILARY TERM.

MITCHELL *v.* OLDFIELD.

(4 T. R. 123—124.)

1791.
Jan. 25.

[123]

If A. recover against C. and C. recover against A. and B. the Court will permit C. on motion to set off the damages which he has recovered against those obtained by A. on his undertaking that the bill of A.'s attorney in the first action shall be satisfied, he having a lien on the judgment for his costs.*

In this action the plaintiff recovered a judgment against the defendant for 182*l.* 10*s.*: but the defendant, having also recovered in another action against this plaintiff and another, obtained a rule to shew cause why the debt and costs in the latter should not be set off against the judgment in the former action; suggesting (among other reasons) that Mitchell had absconded.

Bearcroft now shewed on behalf of Mitchell's attorney in the first action; contending, That as he was not concerned as an attorney in the other action, he had a lien for his costs on the judgment obtained by his client. He also hinted, that perhaps the Court would not interfere at all in this case, inasmuch as one debt was due to the plaintiff alone; whereas the other was the joint debt of the plaintiff and another to the defendant: and he observed, that this was not such a debt as could be set off under the statute. But

* Owing to a conflict of decisions between this Court and the Court of Common Pleas as to the effect of a set-off in regard to the attorney's lien, rules of Court were made in 1832 (Hil. T. No. 93), and 1853 (Hil. T. No. 63), following the decisions of the King's Bench. The cases in Chancery adopt substantially the principle of the King's Bench. See

Ex parte Rhodes, 15 Ves. 539; *Wright v. Mudie*, 1 S. and S. 266; *Collett v. Preston*, 15 Beav. 458. See now the statute 27 & 28 Vict. c. 127, s. 28. Cases under this statute are *Bailey v. Birchell*, 2 H. & M. 371; *Throckmorton v. Crowley*, L. R. 3 Eq. 196; *Ex parte Cleland*, L. R. 2 Ch. 508; *In re Bank of Hindustan*, L. R. 3 Ch. 125.—R. C.

LORD KENYON, Ch. J. said :

That this did not depend on the statutes of set-off; but on the general jurisdiction of the Court over the suitors in it: that it was an equitable part of their jurisdiction, and had been frequently exercised: but as to the other point, he observed, That the attornies and solicitors of the different Court have a lien on all papers in their hands, and judgments recovered, for their costs: that in the Court of Chancery they were permitted to retain title deeds for that purpose; and he thought it right that the attorney in this *case should be satisfied for his costs before the defendant was allowed to make the set-off.

1791.
MITCHELL
v.
OLDFIELD.

[*124]

BULLER, J.:

Though this Court have said, That they will not interfere on behalf of the attorney, and prevent the plaintiff settling his own cause without first paying the attorney's bill,† yet when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the Court will take care that the attorney's bill is satisfied.

The Court made the rule absolute, on the defendant's undertaking to pay the attorney's bill, and on his entering a *remittitur* in the cause in which this defendant was plaintiff.‡

THE KING v. E. TOPHAM.

(4 T. R. 126—130.)

1791.
Jan. 29.

[126]

An indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred of the King's subjects against them, and to excite his relations to a breach of the peace, cannot be supported. Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, and had occasionally applied at the stamp-office respecting the duties, is evidence that he is the publisher. (See *Reg. v. Labouchere* (1884) 12 Q. B. D. 320; 53 L. J. Q. B. 362.)

THE defendant was indicted for a libel, reflecting on the memory of the late Earl Cowper; on the trial of which, before

† *Vide Welch v. Hole*, Dougl. 226. and *Randle v. Fuller*, 6 T. R. 456.

‡ See *Bead v. Dupper*, 6 T. R. 361,

1791. Mr. Justice Buller, the defendant was found guilty. * * *
 THE KING A rule was obtained in last Michaelmas Term, to shew cause
 v. either why a new trial should not be granted, or why the judg-
 E. TOPHAM. ment should not be arrested.

Erskine, Chambre, Garrow, and Martin, shewed cause against the rule; and *Mingay, Graham, and Conste*, supported it. These
 [*127] questions were argued very much at length on general *principles; and the principal case cited in support of the indictment was that in 5 Co. 125, *de libellis famosis*.

The COURT took time to consider of the questions; and now

LORD KENYON, Ch. J. delivered the opinion of the Court:

This was an indictment for a libel, tried before my brother BULLER, who left to the consideration of the jury the two questions which generally arise on these trials; namely, Whether the defendant were or were not the publisher? and Whether the innuendos were made out?—and the jury found the defendant guilty. An application was made in the last Term for a new trial, or to arrest the judgment. The grounds for the former were, that another question should have been left to the jury, namely, Whether this paper were published in the spirit of a biographer, or with a malicious intention to defame and vilify the character of Lord Cowper? Of the first question which the jury determined, Whether the defendant were or were not the publisher? there can be no doubt whatever; the evidence was perfectly satisfactory. It was proved that the paper was sold at the office; that the defendant, as proprietor of the paper, had given a bond to the stamp-office, pursuant to the 29 Geo. III. c. 50, s. 10, for securing the duties on the advertisements: and that he had from time to time applied to the stamp-office respecting the duties on the paper. It is impossible therefore to say that this was not strong evidence to be left to the jury to shew that he was the publisher. Then it was asked at the bar, Shall every person who is a proprietor of a paper, as a feme covert, an infant, or a trustee, be answerable criminally for the acts of the agent, in inserting libellous matter in the paper? To that question it is

sufficient to answer, That this is not one of those cases. This was the case of an adult; and this unquestionably was proper evidence to the jury, who have drawn the only conclusion which, in the discharge of their duty to themselves and the public, they could draw. Then it was argued that, even supposing there was sufficient evidence of publication, there was no evidence of a criminal intent in the defendant. To this I can answer in the words of Lord MANSFIELD, in *R. v. Woodfall*,† That “where the act is in itself unlawful (as in this case) the proof of justification or excuse lies on the defendant; and, in failure thereof, the law implies a criminal intent.” There may indeed be cases, and so it was admitted in *R. v. Nutt*,‡ of a publication in point of law, where no criminal intention can be imputed to the party; as *where a person delivers a letter, without knowing its contents, or delivers one paper instead of another. But here no evidence was offered to the jury to disprove the publication: the case was nakedly left to them to make that inference, necessarily arising from the publication of a paper, which at present I am supposing to reflect on the memory of the nobleman mentioned in the indictment. Therefore, we are of opinion that the questions put to the jury were the only questions which it was the duty of the judge to leave to them, and that they have drawn the only inference which could fairly be drawn from that evidence; and consequently that there is no ground for a new trial.

The next question is, Whether or not the judgment ought to be arrested? and that question is supposed to have some novelty in it. The only judicial decision on this subject, which was cited at the bar, was that in 5 Co.; the case *de libellis famosis*; where it is said, that publications defamatory of dead persons are libellous; and the reason given is, because it tends to stir up others of the same family, blood, or society, to revenge, and to break the peace, by provoking them to vindicate the memory of the deceased, and to wipe off that stain which the reflections on the ancestor may cast upon them. But it is to be observed, that that was not the point in judgment; for it was a libel on the living archbishop as well as on his predecessor; and therefore

1791.
THE KING
v.
E. TOPHAM.

[*128]

† 5 Burr. 2667.

‡ Fitz. 47.

1791.
THE KING
v.
E. TOPHAM.

the judgment for the former might well have been sustained, without going into the other point incidentally mentioned by the Court. In 1 Hawk, P. C.† it is said, “The chief cause for which the law so severely punishes all offences of this nature (libels) is the direct tendency of them to a breach of the public peace, by provoking the parties injured, and their friends and families, to acts of revenge; which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt.” Now it is fit to compare the manner in which this indictment is drawn, with others of a similar nature. This professes to be a libel, merely reflecting on the memory of the late Earl Cowper; and it does not state that it tended to excite his relations to revenge, and a breach of the peace. In other cases, particularly in those reflecting on King William, the indictment charged, that they were published to slander the government,‡ with a view to counteract the revolution. We have seen the indictment in *R. v. *Critchley*; § in which it was alleged that the defendant, “intending to vilify and scandalize the memory of Sir C. Gaunter Nicoll, &c. and to induce a belief that the said Sir C. Gaunter Nicoll had obtained the Order of Knighthood of the Bath by vile and scandalous means;” thereby reflecting on the government which has the distribution of honours; “that he had acted as an enemy to his kingdom, and had voted as a member of parliament corruptly and perniciously, contrary to his duty, &c.; and maliciously to fix a mark of infamy, contempt, and dishonour, on the memory, name, and family, of the said Sir C. G. Nicoll, &c. and to stir up the hatred and evil will of the subjects of the King against the family and posterity of the said Sir C. G. Nicoll.” Now to say, in general, that the conduct of a dead person can at no time be canvassed: to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be

† 1 Hawk. P. C. c. 73, s. 3.

§ Hil. 7 Geo. II; 4 T. R. 129, n.

‡ Carth. 405.

[*129]

done with a malevolent purpose, to vilify the *memory of the deceased, and with a view to injure his posterity, as in *R. v. Critchley*, then it comes within the rule stated by Hawkins; then it is done with a design to break the peace, and then it becomes illegal. But on that question the jury ought to have had the power to deliberate; something like that which was stated in *Critchley's* case, and in *R. v. Horne* † should have been stated. We are therefore of opinion, that, as nothing of that sort is stated in the prefatory part of this indictment, as that it was published with an intent to create any ill blood, or to throw any scandal on the family and posterity of Lord Cowper, or to induce them to break the peace in vindicating the honour of the family, this judgment should be arrested.

1791.
THE KING
v.
E. TOPHAM.
[*130]

Rule absolute to arrest the judgment.

RAVEE v. FARMER.

(4 T. R. 146—147.)

1791.
Jan. 28.

An award made upon a reference of all matters in difference between the parties, does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred.

THIS was an action for money had and received, to recover the proceeds of eighteen bags of red Dutch clover. The defendant pleaded, *inter alia*, an award; to which the *plaintiff replied, that the subject-matter of the present action was not included in the reference, &c. on which issue was joined. At the first trial before Lord Kenyon, at the sittings after Easter Term last at Guildhall, the plaintiff called one of the two arbitrators to whom the matter had been referred, to prove that this matter had never been laid before them by the parties, and that they had not taken it into their consideration in forming their award; but the defendant's counsel objecting to evidence of this nature, on the ground that the submission to arbitration included all matters in difference between the parties, his Lordship thought he was

[*147]

† Cowp. 672.

1791.
RAVEE
v.
FARMER.

bound by the terms of the reference, and rejected the witness; upon which the plaintiff was nonsuited. The Court, however, in Trinity Term last, upon application, set aside the nonsuit; Mr. Justice BULLER referring to a case in point determined by this Court in the time of Lord Mansfield: * and upon the cause going down to trial again before Lord Kenyon, the witness was admitted, and the plaintiff obtained the verdict.

A motion was this day made on behalf of the defendant for setting aside the verdict, and granting a new trial, on the ground that the terms of the reference, being of all matters in difference, was conclusive on the parties, as to all causes of action subsisting between them prior to the submission, of which the subject-matter of the present action was one. But by

BULLER, J.:

There is no colour for the motion. The plaintiff may undoubtedly shew that this matter was not in difference between him and the defendant at the time of the submission, nor referred by them to the arbitrators.

Per CURIAM:

Rule refused.

* The case alluded to was *Golightly v. Jellicoe*, Hil. 9 Geo. III. B. R. In an action of covenant the defendant took issue on all the breaches; secondly, pleaded a general release, and that those breaches were before the release made; and, thirdly, that an action for some other matter was brought by the plaintiff in Mich. 8 Geo. III. and all matters in difference referred; that the arbitrator ordered several sums to be paid, and that the parties should give general releases;

and that the defendant did pay the money, and the releases were given. The plaintiff replied, that these matters were not before the arbitrator; to which the defendant demurred. After argument, Lord MANSFIELD, Ch. J. said, the only question is, Whether a submission of all matters in difference is a submission of matters not in difference?

Et per CURIAM:

Judgment for the plaintiff.

MOREWOOD *v.* WOOD AND ANOTHER.

(4 T. R. 157—161.)

1791.
Feb. 1.

In an action of trespass in the common called A. it is competent to the defendant to show that A. is part of a larger common or waste consisting of A. and B., and that he has a prescriptive right over the whole. Acts of user in B. may be evidence of the prescriptive right over the whole.

TRESPASS for breaking and entering the plaintiff's close, called Swanwick Common.

[The case came before the Court on a special demurrer to a plea. The points of general interest in the case sufficiently appear from the following judgment of]

LORD KENYON, Ch. J. :

[159]

* * If an action be brought for a trespass in a particular close, the defendant may plead that it is a part of a larger close, and that he has a right over the whole. Here it is stated in the plea, That the commons lie open to each other ; and that the defendant has a right in both. No injury is done to the plaintiff by this mode of pleading ; for the defendant, having prescribed for the whole, must prove the whole prescription, otherwise he must fail at the trial ; whereas great injustice might be done to the defendant, if he were not permitted to plead this prescription over the whole ; for if he were not, he would not be permitted to give evidence of acts of ownership over Swanwick Green, when perhaps his own convenience might have led him to exercise more frequent acts of ownership over that part of the common than over the other part at a greater distance from his own home : and in very extensive wastes and commons it frequently happens, that particular persons, for their own convenience, depasture their cattle on particular spots ; but that by no means excludes their right over the other parts : and in such case it would be extremely unjust that commoners, who are sued for trespasses upon one part of the waste, should not be permitted to prescribe for the whole.

LEFTLEY *v.* MILLS.

(4 T. R. 170—175.)

1791.
Feb. 3.

[170]

By the common law, according to Mr. Justice Buller, the undertaking of the acceptor of a bill is to pay the bill on demand at any reasonable hour on the last day of grace. [See now the Bills of Exchange Act, 1882, sections 14 (1), 45 (1) & (3), 47 (1), 51 (1) & (4), & 57.]

THIS was an action by an indorsee of an inland bill of exchange, drawn for 20*l.* 7*s.* against the acceptor. The bill was dated 4th April, 1790, payable fourteen days after sight, and being accepted on the 7th, consequently became due, allowing the three days grace, on the 24th, which fell on a Saturday. There was a plea of *non assumpsit* as to the whole, except 20*l.* 7*s.* 6*d.* and as to that a plea of tender. On the 24th, the plaintiff having left the bill at Lockhart's, his banker's in Pall-Mall, one of Lockhart's clerks called at the defendant's house with the bill; but the defendant not being at home the clerk left word where the bill lay, that the defendant might send and take it up; which not being done before six o'clock, it was noted by another clerk of Lockhart's, who was a notary. Between seven and eight o'clock in the evening the same person who first went to the defendant's, called on him again with the bill, in the character of the notary's clerk, when the defendant offered to pay the amount of the bill, but refused to pay half-a-crown more which was demanded for the notary. Evidence was given that it was usual to pay 1*s.* and 6*d.* for noting and demanding in the city, and 2*s.* and 6*d.* on the west side of Temple-bar, where this transaction happened; and that *by the custom the acceptor of a bill has during the banking hours to discharge it in; but if he be not paid by that time, it may be noted: but as to what those banking hours were, no certainty appeared; they were different at different parts of the town. At all events, however, it was admitted, that the second time the clerk called with the bill was after the banking hours. Lord KENYON was of opinion at the trial at the Sittings after last term, that the tender of the amount of the bill at any time on the same day on which it was payable was sufficient; under which direction the jury found a verdict for the defendant. A rule *nisi* was obtained for setting

[*171]

aside the verdict and granting a new trial, on the ground that half-a-crown more, the charge of noting, ought to have been tendered.

1791.
LEFTLEY
v.
MILLS

The Court, on granting the rule, said, they could not take notice of what were called banking hours, but considered the main question to be, Whether the acceptor had the whole day to pay the bill in ? or whether it became due on demand at any time on the last day ?

[Upon this question Lord KENYON, Ch. J. expressed an opinion to the effect that the obligation in a bill, like that for rent &c., was to pay at *any* time on the last day of grace ; so that the acceptor had the whole day to pay it in. The decision of the Court, however, turned upon the express terms of the statute 9 & 10 W. III. c. 17,* and is now unimportant. The following was the judgment pronounced by]

BULLER, J :

[174]

As to the event of this rule, I most thoroughly concur in opinion with the Court ; but I cannot refrain from expressing my dissent to what has fallen from my lord, respecting the time when the payment of bills of exchange may be enforced. The rule as to the time of paying rent, or any of the other cases mentioned by my lord, cannot, I think, apply to this case. But one of the plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is to pay the bill on demand on any part of the third day of grace ; and that rule is now so well established, that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace. Now that supposes a default in payment, for a protest cannot

* By this statute the protest on an inland bill may be made "*after the expiration*" of three days after the bill becomes due. By the Bills of Exchange Act, 1882 (s. 51 (1) & (4)), it is now made clear that when an inland bill is protested it must be noted on the day of its dishonour. And this, under sections 14, 45 & 47,

may take place on the last day of grace. The judgment of Buller, J., is here reported as showing his view of the principle of the common law as to the time for payment ; being the principle which has in effect been adopted by the Bills of Exchange Act, 1882.—R. C.

1791.
 LEFTLEY
 v.
 MILLS.

[*:75]

exist unless default be made : but if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore, the usage on bills of exchange is established : they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour ; but, on the other hand, to say that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences. If this case were to be governed by any analogy to the demand of rent, payment of a bill of exchange could not be demanded till sunset ; and if so, the situation of bankers would be extremely hazardous ; for they would then be obliged to send out their clerks at night with bills to a very considerable amount, all of which *must be presented within a short space of time, though to houses in different parts of the town. However, this consideration need not be further pursued for the determination of this case ; for this rule must be discharged, in whatever view it is considered. Even if this had been a foreign bill of exchange, there would have been no pretence for the demand which the plaintiff made. It was properly said by one of the witnesses, That the fees of the notary are for noting and demanding. In making a protest, there are three things to be done : the noting, demanding, and drawing up the protest. The noting is unknown in the law, as distinguished from the protest : it is merely a preliminary step to the protest, and has grown into practice within these few years : but in this case the notary's clerk made a note on the bill, merely for his own convenience, only to save himself trouble, in the same manner as bankers' clerks frequently write on the bill "received the contents," even before they go out of their master's office ; and which words are afterwards struck out, if the bill be not paid. The next, and the material part, is, the making of the demand. The party making the demand must have authority to receive the money ; and in case that is refused, the drawing up of the protest is mere matter of form ; but if the person, on whom the demand is made, be ready to pay the amount of the bill, he does all that the law requires of him. Therefore, if this

had been the case of a foreign bill of exchange, the defendant would not have been liable to pay the fees of protesting, because he was ready to pay when the demand was made. It is material, too, to consider by whom the demand was made in this case: I am not satisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill must be made by a notary public; to whom credit is given, because he is a public officer. However, in this case there could be no protest at all. It is clear that, at common law, no protest was required on an inland bill of exchange: it is only made under the statute of William, which does not apply to this case, for the reasons already given.

1791.
LEFTLEY
v.
MILLS.

HUNTER AND OTHERS, ASSIGNEES OF BLANCHARD
AND LEWIS, BANKRUPTS, *v.* POTTS.

(4 T. R. 182—194.)

PHILLIPS *v.* HUNTER.

IN ERROR.

(2 H. Bl. 403—419.)

If, after the assignment of a bankrupt's estate, a creditor knowing it, and residing in England, attach the money of the bankrupt abroad, the assignees may recover it in an action for money received to their use.

THIS was an action for money had and received; to which the defendant pleaded the general issue. On the trial *before Lord Kenyon at Guildhall, a special verdict was found; which after setting forth the formal parts (namely, the trading, the petitioning creditor's debt, the bankruptcy, the commission, and assignment) stated that the bankrupts before their bankruptcy were indebted to the defendant on a contract made in England; at which time, and also at the time of the bankruptcy, and until the assignment of the attachment hereafter mentioned, all the parties were resident in England; that after the issuing of the commission of bankrupt, and the making of the assignment, the defendant, knowing thereof, gave orders to his attorney in Rhode Island, North America, to attach the effects of the bankrupt in

1791.
Feb. 7.

[*183]

1791.
HUNTER
v.
POTTS.

that island; in consequence of which the attorney, in May 1785, attached, in the regular way, certain monies in the hands of J. and W. Russell, which were due from them to the bankrupts at the time of the bankruptcy; and in November 1786, obtained, in the Court of Common Pleas in Rhode Island, a regular judgment against the bankrupts for 496*l.* 12*s.* 9*d.* and costs; which sum he afterwards received, and remitted to the defendant in England, who claims to hold the same to his own use. The verdict also stated, that the proceedings of the Court in Rhode Island were continued by imparlances, from May 1785, to November 1786, at the request of the Russells, in order that the bankrupts might have notice of such proceedings.

This verdict was twice argued; the first time in last Trinity Term, by *Wood* for the plaintiffs, and *Marryat* for the defendant; and in Michaelmas Term by *Law* for the plaintiffs, and *Bower* for the defendant. * * *

[192] LORD KENYON, Ch. J. now delivered the opinion of the Court:

In the argument in this case, many quotations were made from the writers on the civil law, which it is not necessary to consider in determining this question. Generally speaking, it must be admitted, that personal property must be governed by the laws of that country where the owner is domiciled. Neither do we mean to break through the rule that the Courts of one country ought to pay a proper deference to the decisions of the Courts in another having competent jurisdiction, where the facts on which the decision was made were fairly disclosed to such Court; but the general question here is, Whether the assignment which was executed by the commissioners of the bankrupt, was sufficient to vest the bankrupt's property in the plantations abroad, in the assignees under the commission?—because, if it did so vest at the time of the assignment, it is immaterial to consider in this case, how far the relation under the bankrupt laws should take effect in Rhode Island, since the assignment was executed anterior to the time when the attachment-suit was there commenced. Therefore, the only question here is, Whether or not the property in that island passed by the assignment in

the same manner as if the owner (the bankrupt) had assigned it by his voluntary act? And that it does so pass cannot be doubted, unless there were some positive law of that country to prevent it. Every person having property in a foreign country, may dispose of it in this: though, indeed, if there be a law in that country directing a particular mode of conveyance, that must be adopted; but in this case, no law of that kind is stated; and we cannot conjecture that it was not competent to the bankrupt himself, prior to the bankruptcy, to have disposed of his property as he pleased. Now the bankrupt statutes have expressly enacted, that the commissioners may assign all the property of the bankrupt in the most extensive words; and, therefore, on the general reason of the thing, if there be no positive decision to the contrary, no doubt could be entertained but that, by the laws of this country, uncontradicted by the laws of any other country where personal property may happen to be, the commissioners of a bankrupt may dispose of the personal property of a bankrupt resident here, though such property be in a foreign country. Then let us consider the decisions which have been made on this *subject. The case of *M'Intosh v. Ogilvie*† agrees with our opinion. There it is to be observed, that Lord HARDWICKE, on his being told that the defendant in

1791.
HUNTER
v.
POTTS.

[*193]

† H. 21 Geo. II. In Chancery.—“The plaintiff was the assignee of a bankrupt, the defendant a creditor, who before the bankruptcy went into Scotland, and made arrestments on debts due to the bankrupt from persons there. Upon an affidavit of the defendant's having got this money into his hands, a *ne exeat* was granted; and a motion was now made on the behalf of the defendant to discharge it, upon a supposition that he had a right to the goods as creditor by his arrestments.

“The LORD CHANCELLOR asked, whether he had sentence before the bankruptcy; and, being answered in the negative, he said, ‘Then it is like a foreign attachment, by which this Court will not suffer a creditor

to gain priority, if no sentence were pronounced before the bankruptcy. I cannot grant a prohibition to the Court of Sessions; but I will certainly make an order on the party here to restrain him from getting a priority and evading the laws of bankruptcy here. If the gentleman were not going abroad, I would do nothing; but as he is, I will not discharge the writ without his giving security to abide the event of the cause.’

“N.B. The *Solicitor-General* said there had been cases where creditors had got a priority; and after coming here, have been obliged to refund in a Court of Law in an action for money had and received.”

1791.
HUNTER
v.
POTTS.

that case had not obtained a sentence before the bankruptcy, said, "Then it is like a foreign attachment, by which this Court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy." In another part he intimated a strong opinion that the property in Scotland should not be taken by one creditor to the prejudice of the rest of the creditors here: and at the close of that case the *Solicitor-General* observed, that this precise question had been determined. But the case of *Beckford v. Turner* was relied on, when this case was first argued, as a determination in favour of the attachment creditor: but certainly no question of that kind was stated among the reasons assigned by the counsel, nor was it brought in judgment in that case; the single question there was, Whether or not the proceedings in the island of Jamaica were conformable to the mode pointed out by the act of assembly there? and if it had been stated in the reasons signed in that case, this question could not have arisen in deciding it. There was, indeed, a *dictum*, rather than a decision, in *Wilson's* case, that the assignment by the commissioners had no other effect than a voluntary assignment. I believe the doubt in all these cases has arisen from not attending to the meaning of the word "voluntary." It has been contended that it means "without a valuable consideration:" but it is impossible to consider it in that light; for in the case of a bankruptcy there must be a consideration: it means the bankrupt's own voluntary act, as contra-distinguished from a compulsory act by law. Therefore on the reason of the thing, even without any authorities, we have no *difficulty in saying that the title of the plaintiffs must prevail. For it must be remembered, that during the progress of this business all these parties resided in England; that the defendant, knowing of the commission and of the assignment, in order to gain a priority, transmitted an affidavit to Rhode Island to obtain an attachment of the bankrupt's property there, in violation of the rights of the rest of the creditors, which were then vested: but such an attempt cannot be sanctioned in a Court of Law. But, in addition to these reasons, the decisions which have been made on this subject remove all doubts whatever. It is not necessary to go through them, because they were mentioned in the argu-

[*194]

ment, and are collected in H. Bl. Rep. C. B. 131 & 132, n.; *Salomons v. Ross*, before Lord Bathurst; *Jollet* and another v. *Deponthien* and *Barril*, before Lord Camden; and *Neale* and another v. *Cottingham* and another, in Ireland, before Lord Chancellor Lifford. The second of these I have reason to believe was considered by Lord CAMDEN as a very clear case; for he did not think it important enough even to make a note of it in his book; and although the last case was not decided in this country, yet it was determined by a very respectable authority, Lord LIFFORD, assisted by several of the judges, and that noble lord was conversant with the laws of this country, having sat on the bench here for several years before he went to Ireland; and we know also that Davis's reports of the decisions in that country are cited as authority here. There are therefore these three decisions, in addition to the case before Lord Hardwicke, in support of our opinion; and there are none to the contrary, except indeed what was said in *Wilson's* case; and that seems to have turned on mistaking the import of the word "voluntary."

We are therefore clearly of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

1791.
HUNTER
v.
POTTS.

IN the case of *Hunter v. Phillips* in which the facts were exactly similar to those in *Hunter v. Potts*, the Court of King's Bench gave judgment without argument in accordance with the above judgment. A writ of error was brought upon this last judgment, and was twice argued in the Exchequer Chamber. Ultimately the COURT, by a majority (ROOKE, J., THOMPSON, B., HEATH, J., PERRY, B., HOTHAM, B., and MACDONALD, Ch. B. against EYRE, C. J. *diss.*) affirmed the judgment of the King's Bench. The substance of the reasoning of the majority is given in the report in 2 H. Bl. 403, 405. The dissenting judgment of EYRE, C. J. is given at length in the same report p. 410. The *ratio decidendi* of the judgment of the majority is substantially the same as that of Lord KENYON's judgment above given: and the dissenting judgment is not of sufficient importance or interest to be repeated in the Revised Reports.—R. C.

1791.
PHILLIPS
v.
HUNTER.
In error.

1791.
Feb. 10.

THE KING v. JAMES HARRIS.

(4 T. R. 202—206.)

The 26 Geo. II. c. 6, s. 1, enacts, that all persons going on board ships coming from infected places shall obey such orders as the King in council shall make, without annexing any particular punishment; the disobedience of such an order is an indictable offence, and punishable as a misdemeanor at common law.

[THIS was an information by the Attorney-General for a breach of an order in council as to quarantine made pursuant to the Act, 26 Geo. II. c. 6, s. 1.

At the Sittings at Westminster before Lord Kenyon, the defendant, who was a pilot, had been found guilty.]

[203] The *Attorney-General* and *Bearcroft* now prayed for the judgment of the Court; which they said was discretionary, under the first section of the statute, as in the case of a misdemeanor at common law; for though, when an Act of Parliament creates a new offence, and in the same clause gives a specific punishment, the Court have no discretion, but must inflict that punishment; yet when the offence is created by a separate

[*204] *substantive clause, the Court may give a general judgment for that offence, as in the case of a misdemeanor, notwithstanding there be another section in the same statute giving a specific punishment. * * *

Garrow, for the defendant, said: That the punishment of six months' imprisonment, directed by the fifth section, was for a different offence from this, and applicable only to those persons who came in the ship from the infected place; and that it was not enacted by the first section, that the party should be subject to the penalties in the Act of Parliament, but merely to such order as the King in council should make. * * *

LORD KENYON, Ch. J. :

By the first section in this Act of Parliament, the King is authorized to make such orders in council respecting persons

going on board ships which come from infected places, as he shall be advised. Now this indictment states, That the King in council made an order in pursuance of *this Act, which the defendant violated ; and therefore, without adverting to the other clauses in this Act of Parliament, which are adapted to other offences, the question is, Whether or not the disobedience of an order thus made by the King in council be not an offence at common law ? And most unquestionably it is. This question, or at least the principle of it, does not now arise for the first time. In *R. v. Robinson*,† the defendant was indicted for disobeying an order of maintenance of his grandchildren. The statute 43 Eliz. c. 2, s. 7, enacts, That fathers, grandfathers, &c. shall maintain their children and grandchildren, &c. in such manner as the justices shall direct ; and it annexes the penalty of 20*l.* per month ; to be recovered in a summary way by distress, &c. under the eleventh section. The prosecutor in that case, however, thought proper to prefer an indictment against the defendant, for disobeying an order of justices made upon him ; and, after verdict, a motion was made in arrest of judgment, which was argued very ably, on the ground that, as the Act of Parliament had annexed a specific punishment, and prescribed a particular mode of proceeding, it was not an indictable offence. But the Court, after great deliberation, were clearly of opinion, That as the Act of Parliament had given the justices power to make the order, the breach of it was indictable as a misdemeanor at common law. So here, this statute gave authority to the King in council to make the order in question ; and the disobeying it becomes an indictable offence at common law.

1791.
THE KING
v.
HARRIS.
[*205]

ASHHURST, J. :

It is a clear and established principle, that when a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty ; but he may proceed on the prior clause, on the ground of its being a misdemeanor. Now, here the defendant has been guilty of a breach of the first

† 2 Burr. 799.

1791.
THE KING
v.
HARRIS.

[*206]

section of this Act of Parliament, which expressly gave power to the King in council to make orders relative to persons going on board ships liable to perform quarantine; for the indictment states, That the King in council made an order on this subject, which was competent to him to make; and that the defendant disobeyed it: for this he is clearly punishable as for a misdemeanor at common law. This renders it unnecessary to make any determination on the fifth section of the Act; but if it were necessary to consider it, I should think that it relates only to the officers and passengers who came on board the ship from the infected place, and not to persons going on board after her arrival here.

BULLER, J. :

On the first clause in this Act of Parliament, coupled with the order in council, there is no doubt but that the defendant may be punished upon a common law indictment. I agree also with my brother ASHHURST, that the defendant is not within the meaning of the fifth section; which is material to be considered, on account of the punishment to be inflicted on him; because if he be liable to be sued hereafter for the 200*l.* penalty, we should not inflict the same punishment as if he were not liable to that penalty. Now that section subjects the captain to a penalty of 500*l.* for quitting the ship himself, or for suffering any seaman or passenger so to do; and then the Legislature considered what punishment should be inflicted on the seamen or passengers quitting the ship; and enacted by the latter part of the same section, that they should be imprisoned for six months, and should forfeit 200*l.*; for it says, "if any person shall so quit such ship," &c. namely those persons before described, "the seamen and passengers;" and it proceeds to enact that "every such person so quitting, &c. shall forfeit 200*l.*" This section therefore wholly relates to the captain, seamen, and passengers, and not to persons in the defendant's situation.

GROSE, J. :

The Act of Parliament having given power to the King in council to make the order in question, and not having annexed

any specific punishment to the disobedience of it, is undoubtedly a common law offence, and must be punished accordingly.

ASHHURST, J. then pronounced the judgment of the Court on the defendant, that he be imprisoned in the King's Bench Prison for a year.

1791.
THE KING
v.
HARRIS.

BROUGH v. WHITMORE.

(4 T. R. 206—211.)

1791.
Feb. 11.

Provisions sent out in a ship for the use of the crew for the intended voyage, are protected by a policy of assurance on the ship and furniture.

THIS was an action on a policy of insurance on an East India and China ship; and on the tackle, ordnance, ammunition, artillery, and furniture of the ship. At the trial before Lord Kenyon at the Guildhall Sittings, it appeared that, while the ship was lying off Bank-Saul Island, in the river Canton, it became necessary to refit her; for which purpose the stores and provisions were taken out of her, and put into a warehouse, called a Bank-Saul: and that while they were in *the warehouse they were destroyed by an accidental fire. It was admitted that the policy covered all the articles but the provisions, which were merely for the use of the ship's crew: but if those provisions were not protected by the policy, then there was not an average loss of 3*l.* per cent. It was considered in the same light as if the accident had happened on board the ship. For the defendant it was contended, that the provisions were not protected by the insurance: but one of the jury † said, that it had been determined in Lord Mansfield's time that they were included under the word "furniture," under which decision the merchants in the city had since acquiesced; on which the plaintiffs obtained a verdict.

[*207]

Erskine, on a former day in this term, renewed his objection, and obtained a rule to shew cause why a new trial should not be granted, on the authority of *Robertson v. Ewer*; ‡ and

† Which was a special one.

‡ 1 T. R. 127; R. R. vol. i. p. 164.

1791.
BROUGH
v.
WHITMORE.

two *nisi prius* cases there mentioned. But the Court desired that some inquiry might be made respecting the case mentioned by one of the jurymen.

Piggott and *Marryat* now shewed cause. They said that they had not found the case mentioned at the trial, but stated the result of their inquiries in the city to be, that the provisions, which were necessary for the use of the ship's crew, were always comprehended under the word "furniture;" and that underwriters had frequently paid the loss on such a policy as the present: but that provisions which were shipped for any other purpose than the ship's crew, were like any other kind of merchandize insured by a policy on the goods. The counsel then observed that this case was distinguishable from that of *Robertson v. Ewer*; for there the loss happened by the extraordinary consumption of the provisions by the negroes during the detention of the ship; but here the provisions were merely for the ship's crew, and were considered as a part of the outfit. * * *

[208]

Erskine, in support of his rule, admitted that "furniture" included everything that was necessary for the accommodation or navigation of the ship; but said that it did not, either in the ordinary acceptation of the word, or in the sense which had been put upon it in the courts of law, comprehend "provisions." In *Robertson v. Ewer*, and the cases there cited, the Court decided on the broad ground that provisions are not protected by a policy on the ship and furniture, and not on the principle now suggested, that the consumption of the provisions was occasioned by the detention of the ship, or by the negroes on board. * * *

LORD KENYON, Ch. J.:

On the trial of this cause I had nothing to guide my judgment on the construction of this instrument but the words of the policy; and when it was stated that "provisions" were included in the word "furniture," I confess I was somewhat at a loss to know to what extent the underwriters were liable on words so in-

1791.
BROUGH
v.
WHITMORE

definite as these which are used. But then I thought, and still continue to think, that the rule of law is to be given (not by merchants) but by the Court; though, when a question arises on the construction of the words of an instrument, which are in themselves ambiguous, it is a matter fairly within the province of those who alone act upon such instruments to declare the meaning of them; and I remember it was said many years ago that if Lombard Street had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer; but that *the uniform practice of merchants and underwriters had rendered them intelligible.

[*209]

The question here arises on the meaning of the word “furniture.” One of the jurymen said, and in that he is now confirmed, that, according to the understandings of those who enter into these contracts, it includes the provisions for the use of the crew. Now, among the several accidents, against which the defendant insured, are perils by fire; and this ship being at Canton, it became necessary to refit her, and to take out all her goods, and land them on this island, where the accident happened; by which these provisions, with the rest of the goods, were burned: and there is no doubt but that the loss on this island must be considered in the same light as if it had happened on board the ship itself. This was determined in *Pelly v. The Royal Assurance Company*.† Then if these provisions be insured as part of the outfit of the ship, and they were consumed by one of the perils insured against, there is an end of the question; a loss has happened within the meaning of the policy; and consequently the defendant is liable. But it was said in the argument, that the instant any of the provisions were consumed on board, there could not be a total loss: but the short answer to that is, That that comes within the wear and tear of the ship, and it might as well be said that if a mast were a little injured, there could not be a total loss. If this decision were to militate against any determination, or even an *obiter dictum*, of Lord MANSFIELD, I should have hesitated for some time before I delivered my opinion. But the case of *Robertson v. Ewer* is clearly distinguishable from the present; here the goods were consumed by

† 1 Burr. 341.

1791.
BROUGH
v.
WHITMORE.

an accident by fire on board the ship (for the island was for this purpose equivalent to the ship) and within the meaning of the policy of insurance : but in that case they were consumed by the negroes during a detention of the ship.

ASHHURST, J. :

The case cited is not like the present, for the reason given ; and I think that this loss comes within the terms of the policy. It is an undertaking to insure against all accidents which will prevent the provisions being applied to the purpose for which they were intended : these provisions were part of the outfit ; they were consumed by fire (one of the accidents against which the defendant insured) and consequently could not be applied to the purpose for which they were put on board.

BULLER, J. :

[*210]

I am clearly of opinion that the underwriters on the body and furniture of the ship are liable to pay the amount of these provisions, which were bought to replace those which *were consumed by an accident within the meaning of the policy. Without commenting on the words of the policy, it is sufficient to say that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument : but it is founded on usage, and must be governed and construed by usage. Now it is perfectly clear that in every instance where losses have been settled, the provisions put on board the vessel when she sailed have been considered as part of the ship. The value is taken in this way ; the underwriters have a right to go and see the ship, to examine the value of the hull, the masts and the provisions ; the value of the ship alone comprehends all these articles : but though the underwriters have a right to examine the ship itself, in point of fact they do not, because they know from experience the quantity of provisions necessary for the crew for the intended voyage ; and if that value be stated to them in the ordinary way, they sign their names immediately, without making further inquiries. Then if the provisions be included in a policy on the ship, and the ship and all the provisions be lost, the underwriters must make good the whole loss, whether it be a valued or an

open policy : but it has been said that, if an accident happen after some of the provisions are consumed, the underwriters are entitled to a deduction to the amount of such provisions : I will answer this, first, As the argument applies to a valued, and then to an open policy. As to the first; from the nature of the policy, the provisions are not insured against all events ; they are only insured against particular risks. Again, there is nothing from which there can be salvage ; if the body of the ship and everything on board be sunk or burned, there can be no salvage ; and, in case of an open policy, the insured must prove by evidence what was the value of the whole, and then the same reasons apply as in the case of a valued policy. With respect to the case of *Robertson v. Ewer*, which has been relied on, I thought at first that it applied strongly to the present ; and if I still entertained the same opinion, I would not, on account of any usage to the contrary among underwriters, overturn a solemn determination of this Court : but that case, and the two others there mentioned, are clearly distinguishable from the present. In all those the insured wished to charge the underwriters with the amount of the provisions consumed during the time when ships were detained. Of those, therefore, it is sufficient to say, that an insurance is on the ship for the voyage ; but, during a detention, the ship is not proceeding ; and therefore the underwriters are not liable. This case also differs from that of *Robertson v. Ewer* in another circumstance ; there the provisions were consumed by the slaves on board, and not by the ship's crew ; and the slaves are considered as part of the cargo. The words of Lord MANSFIELD in that case must be taken with a reference to the case then before him. He was then speaking of a charge for provisions used during the detention of the ship, and for the maintenance of the slaves ; and he said, "There is no authority to shew, that, on this policy, the insured can recover for such a loss ; but it is contrary to the constant practice." Then he proceeded to say, "On a policy on a ship, sailors' wages or provisions are never allowed in settling the damages." Now even if those latter words be taken in their general sense, and not confined to the case immediately before the Court, they are accurate for "provisions" *eo nomine* are not taken into consideration. In

1791.
BROUGH
v.
WHITMORE.

[*211]

1791.
BROUGH
v.
WHITMORE.

general, the captain of a ship takes on board provisions sufficient for the voyage; and if he be detained in any port, and he be a prudent man, he will not use what are called the ship's detention, but he will buy others for immediate consumption during his detention, because he cannot but know that he has the same length of voyage to perform that he had before he was detained; it makes no difference however to the underwriters whether he do so or not; for it the captain be obliged to purchase other stores for the remainder of the voyage, the underwriters are not answerable for these, but only for those which were on board at the time of the insurance, since they only formed a part of the value of the ship. On the whole, therefore, I am of opinion that there should be no new trial. The cases cited are distinguishable from the present; the usage of merchants, as to the construction of these instruments, stands unimpeached, and therefore it must prevail in this case.

GROSE, J. agreed.

Rule discharged.

K. B. EASTER TERM.

1791.
May 20.
[229]

ATKINSON, ADMINISTRATRIX, v. BAKER.
(4 T. R. 229—231.)

If an estate *pour autre vie* be limited to a man, his heirs, executors, administrators, and assigns, and be not devised, it descends to the heir as a special occupant.

THIS was an action of detinue to recover certain indentures of bargain and sale and release, and a certain memorandum in writing. The declaration alleged, that T. Foster, being seised for his own life of a certain freehold estate, conveyed it by lease and release to H. Williams, his heirs and assigns. That Williams, by a memorandum in writing, and signed by him according to the form of the statute, acknowledged the consideration-money in the above conveyance to be the proper money of

W. Atkinson, the plaintiff's intestate, and that the name of Williams was made use of in the conveyance in trust for W. Atkinson, his heirs, executors, administrators, and assigns. That Williams delivered the deeds and memorandum to W. Atkinson, who thereby became possessed of them, and who afterwards died intestate; on which administration was granted to the plaintiff, who thereby became lawfully possessed of the deeds, &c. and, being so possessed, afterwards lost them; and that they came into the possession of the defendant, who is the heir-at-law of W. Atkinson, and who still detains them. To this declaration there was a general demurrer and joinder.

1791.
ATKINSON
v.
BAKER.

Johnson in support of the demurrer, insisted that the plaintiff was not entitled to the deeds, the defendant being a special occupant of the estate. Prior to the statute 29 Car. II. c. 3, every estate *pour auter vie*, of which there was no special occupant marked out by the grant, belonged to the person who first took possession of it. But this being found inconvenient, that statute was passed to remedy it; and it enables† the proprior to devise it, and enacts, That if no devise be made, it shall be chargeable in the hands of the heir, if it come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-*simple; and in case there be no special occupant, it shall go to the executors or administrators, and be assets in their hands. As doubts arose to whom the surplus of such estates should go after paying the intestate's debts, when they were not devised, the 14 Geo. II. c. 20, s. 9, enacted, that such estates *pour auter vie*, in case there be no special occupant thereof, of which no devise has been made by virtue of the 29 Car. II. should be distributed as personalty. Now those statutes only apply to the cases of a vacant possession: but here there was a special occupant, namely the heir of W. Atkinson. If it be contended, that the administratrix of W. Atkinson may take this as a special occupant, and 2 Vern. 719, 3 Atk. 466, and Carth. 376, be cited, it may be answered, that the plaintiff, as the administratrix, might have taken if it had not been limited

[*230]

† Sect. 12.

1791.
 ATKINSON
 v.
 BAKER.

to Atkinson's heirs. But it never has been held in a case where a freehold is limited to a man, his heirs, executors, and administrators, that the latter can take to the exclusion of the heirs.

[*Gardiner* was heard on the other side.]

LORD KENYON, Ch. J. :

[*231] The law on this subject has been truly stated by the defendant's counsel. If an estate *pour auter vie* be limited to a man, his heirs and assigns, and if it be not devised, it goes to the heir under the statute of frauds, and is liable to the same debts as a fee-simple is. Where it is granted to a person, his executors, administrators, and assigns, the executors take it subject to the same debts as personalty of any other description is ; and by the 14 Geo. II. it is distributable. Now in this case, before the plaintiff can recover the deeds in question, she must shew a title to the estate in respect of which she claims the deeds : but she objects to the defendant's retaining them, because his title, if any, is only equitable, and cannot be inquired *into in a Court of Law. Now, this Court either has or has not a right to inquire in whom the equitable title is vested ; and in either way of considering the question, there must be judgment against the plaintiff. If it be so doubtful a point that we cannot decide it in a Court of law, the plaintiff must seek redress in equity ; because the right to these documents must follow the title to the estate : and if we can examine into the title, the defendant, who is the heir at law of the tenant *pour auter vie*, must have judgment. The estate in question was conveyed to Williams, his heirs and assigns ; and it appears by the deed of trust, which, as being a declaration in writing, is valid by the Statute of Frauds, that Williams held the estate in trust for Atkinson, his heirs, executors, administrators, and assigns. The first limitation is to the heirs ; and in the ordinary course of this species of property it goes to the heir-at-law, because it is a real estate. Then it is urged, that we ought to exclude the heir, in order to let in a more numerous class of creditors : but, however convenient it might be if such were the law, when we are deciding according to

law, we must take care not to infringe one of its first rules : and here the heir-at-law is entitled to the estate as a special occupant ; and has consequently a right to detain the possession of those documents which belong to the estate.

1791.
ATKINSON
v.
BAKER.

THE KING v. THE MASTER AND FELLOWS OF
ST. CATHERINE'S HALL, CAMBRIDGE.

1791.

[233]

(4 T. R. 233—245.)

In the case of a private eleemosynary lay-foundation, if no special visitor be appointed by the founder, the right of visitation, in default of his heirs, devolves upon the King, to be exercised by the great seal. On this ground the King is the visitor of St. Catherine's Hall, Cambridge ; and this Court refused to interfere by mandamus, to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election.†

A RULE was granted in the last term, calling upon the defendants to shew cause why a mandamus should not issue, commanding them to declare the fellowship of the Rev. Joshua Wood vacant ; and to proceed to the election of another fellow. The college was founded and endowed by Doctor Wodelarke, who gave certain statutes ; and the foundation, which consisted of a master and fellows, was confirmed and incorporated by letters patent of the 15th of Ed. IV. Mr. Wood, a fellow of this college, was, about two years ago, inducted to the vicarage of Madingley, in the county of Cambridge, situated at the distance of three miles and an half from the University : the acceptance of which living, it having the cure of souls, and being of the value of above ten marks a year in the King's books, it was contended vacated his fellowship. * * * It appeared, That no visitor had been appointed by Wodelarke the founder ; and that his heirs were extinct. * * *

[234]

Erskine, Law, and Graham shewed cause against the rule ; contending 1st, That in default of heirs of the original founder,

† *Reg. v. Hertford College* (1878) 3 Q. B. D. 693 ; 47 L. J. Q. B. 649.

1791.
THE KING
c.
THE MASTER
and FELLOWS
of ST. CATHE-
RINE'S HALL.

the right of visitation devolved on the King, who visited by his chancellor, or by special commissioners appointed under the great seal; and consequently that this Court ought not to take cognizance of the question. It is clear, that where the King is founder of an eleemosynary lay-corporation; or where the King and a private person are joint founders; or where a private person endows a royal foundation without specially appointing a particular visitor,—in all these cases the King is visitor, and visits by his chancellor. 1 Inst. 96, F. N. B. 42; 2 Inst. 68; [235] 2 P. Wms. 326, *Eden v. Foster*. * * * In *Phillips v. Bury*,† Lord Holt says, “A visitor is of necessity created by the law:” and the provisions of the 25 Hen. VIII. c. 21, s. 20, are in conformity to this principle; which enables the King, by commission under the great seal, to visit all monasteries, colleges, hospitals, priories, houses and places religious exempt. * * *

[238] *Bearcroft, Le Blanc, Serjt. and York, contrà*, admitted that where the King was a visitor in right of a royal foundation, or by special designation, the power was to be exercised through the medium of his chancellor, and not by this Court; and that where there was any visitor, this Court would not interfere in matters of visitatorial appeal; but contended that none of the authorities cited in support of those positions affected this case, where in default of heirs of the founder there was no visitor. [239] * * The only power that can result to the Crown is that which flowed from its political capacity; and such power must be exercised by this Court. Nor is there any instance of interference by the Court of Chancery where there was no visitor; and all the cases wherein that Court have interfered on the ground of the King's being visitor, are where the college was of royal foundation. The case of *The King v. The Bishop of Chester*,‡ where the Court interfered by mandamus, was much stronger [240] than the present. * * * The authority of that case has been repeatedly recognized, both in Chancery and in this Court.

† 2 T. R. 352.

‡ 2 Str. 779, and a MS. note of Lord Hardwicke.

Green v. Rutherford, 1 Vez. 471; *Rex v. Gregory*, E. 12 Geo. III.; † and *Rex v. Bishop of Ely*, R. R. vol. i. p. 484, ante; *and

† *Rex v. Gregory*, East. 12 Geo. III. B. R. Upon a rule to shew cause why an information in nature of *quo warranto* should not be exhibited against the defendant, to shew by what authority he claimed to be fellow of Trinity Hall in Cambridge, the case appeared to be, that the defendant had been elected by a majority of the fellows; but the election had been made on a different day from that which the master had appointed, who claimed a right by the statutes of the college of appointing a day for the election, and presiding thereat if he pleased.

On showing cause against the rule,

Wallace, Mansfield, and Robinson, first objected to the mode of application: that in those cases of lay-eleemosynary foundations it was intrusted to the founder and his heirs, or other special visitor, to terminate all such disputes as the present; and that they ought not to be determined by information in nature of *quo warranto*. But Dr. Marriott, the master of this college, grounds this application on an affidavit, that he does not hear of any heir of the founder being alive; but supposing there is no such heir in existence, the right of determining these disputes must result to the Crown by prerogative.

Again, by 9 Anne, c. 20, this Court does not require any authority to grant these informations with regard to college-offices. * * *

LORD MANSFIELD, Ch. J.:—

As to the first objection to this mode of application, that this Court cannot interfere, because, if there be no visitor, the power of visiting escheats to the King in Chancery as a charity, I answer, That the foundation is not a charity, and the power of superintending it does not go to

the King as visitor; but it is a corporation; and as such, the right devolves to the King to be exercised here. The case of Manchester College is very strong to this point; for there, as long as the suspension of the visitatorial power lasted, it was the same as if there had been no visitor; and the King, in this Court, proceeded upon it. The statute 2 Geo. II. c. 29, is here very material; for as this Court did not exercise the ordinary visitatorial power, that act made the King visitor of Manchester College; but if any question concerning the election and interest arose, the act fixed the decision of it in this Court. This being clear as to the right of this Court to interfere, how is this mode to be applied? The change of the judge does not change the test by which it must be determined, which is by the statute of the college. As to this mode by information, the objection to it is strong, that no such information can be filed here under the stat. 9 Anne, and that all other informations ought to be filed by the *Attorney-General*; but those informations did exist before the statute of Anne. Every college is a corporation in itself; and altogether they form one corporation in the university in gross. There is a case in Rushworth, where it is said, that the visitor of the university at large is the Archbishop of Canterbury. Yet if a person shew here a grievance, which wants to be remedied, this Court will find a remedy. A mandamus, or an action brought by a fellow, appointed by the master in right of a lapse, might have answered the same purpose. But upon the merits, I have not a shadow of doubt.

[His Lordship then proceeded to shew that Mr. Gregory had been duly elected.] *Rule discharged.*

B B 2

1791.

THE KING

THE MASTER
and FELLOWS
of ST. CATHERINE'S HALL.

[*241]

[241]

1791.
THE KING
v.
THE MASTER
and FELLOWS
of ST. CATHE-
RINE'S HALL.

[243]

what was said by Lord MANSFIELD in *Rex v. Gregory* is directly in point to this question, and was not merely an *obiter dictum*, like the opinion of Lord HOLT in 12 Mod. but was one of the points for the determination of the Court. * * *

The COURT took time to consider this question ; and now

LORD KENYON, Ch. J. delivered the opinion of the Court :

Having observed the anxiety of the parties to have this question decided, we think it is better to give our opinion now, having maturely weighed all the authorities, as well those which were cited at the bar as that referred to by Lord HOLT in the case in 12 Modern,[†] than to keep the parties longer in suspense. The principle on which Lord MANSFIELD proceeded in the case of *The King v. Gregory*, and which may not be brought improperly into cases of this kind, was a wish to adapt the administration of justice to the convenience of the parties, not indeed so as to control the law, but as a guide in doubtful cases, and on untrodden ground. Lord COKE also mentions the argument *ab inconvenienti* as a powerful argument in such cases, to shew what the law is. That it is extremely convenient that all disputes of this kind should be decided in *foro domestico* cannot be doubted ; and if that argument were entitled to much weight in *St. John's College v. Todington*, it certainly merits the same attention in this case.

The right now claimed cannot be said to escheat ; it is misapplying the word ; for that appertains to estates held by tenure, and where, on failure of heirs of the donee, the estate reverts to the donor, as an escheat. But there are several kinds of property which belong to the king when there is no other person to take them ; as in the instance of all goods, of which no owner is to be found. Then there is nothing incongruous to the general principles of the law to say that this power, now contended for, which at the time when the charity was founded was vested in somebody, should now devolve on the king, there being no other person who has any claim to it, to be exercised *cy-pres* to the manner in which it was exercised by the founder and his

[†] 5 Ed. IV. 123, Long. Quint.

heirs. This power, though not expressly reserved to the King by the founder, yet belongs to him by operation of law. The great authority against this opinion, and which weighed most in *our minds, was what was said by Lord MANSFIELD in *R. v. Gregory*. But of that it is sufficient to say that it was not the point in judgment before the Court; his attention was not immediately called to it; and I do not believe it was an opinion by which he would wish to be bound; it being at the most an *obiter dictum*, we do not lay so much stress on it as we should otherwise have done, as it came from so high and respectable an authority. The other authority cited on the same side was the case of *Manchester College*, and the Act of Parliament which was passed in consequence of that determination; but I confess that that statute weighs in my mind the other way. It was contended by the counsel in support of the rule, that the last clause of that Act was at variance with the first, and abridged the construction of it. The first clause in that statute enacts that, when it shall happen that the wardenship of Manchester shall be held *in commendam* with the bishopric of Chester, the power of visiting Manchester College shall be vested in the Crown; and it enables the King to visit it, according to the charter of foundation; that power of visitation then must be exercised by the King in his Court of Chancery. If that clause had stood alone, it would not assist the argument in support of the rule; because we must suppose that the legislature intended in that case to follow the course of the common law as nearly as possible; and under that Act the King cannot exercise his visitatorial power in this Court. Then it was argued that the last clause controls the operation of the former, because it provides that disputes concerning the election of the members of the college shall be determinable by the course of the common law, as if there were no visitatorial power in being; but that clause does not say that in future times such shall be the law; it merely respects the case of the then existing members; leaving the power of visiting in other cases in the chancellor, and cautiously avoiding to stir the question relative to the propriety of granting the mandamus, which gave rise to the act. These two authorities, which were urged in favour of the mandamus, being answered to our satisfaction, the

1791.

THE KING
v.
THE MASTER
and FELLOWS
of ST. CATHE-
RINE'S HALL.
[*244]

1791.

THE KING
v.
THE MASTER
and FELLOWS
of ST. CATHE-
RINE'S HALL.

[*245]

only points left for our consideration are the convenience of the case and the general law on the subject. In general, corporate bodies, which respect the public police of the country and the administration of justice, are better regulated under the superintendence of this Court than of the Court of Chancery ; but it is otherwise with eleemosynary foundations in general. What is said by Lord HOLT in 12 Mod. seems decisive of this question : for though it is only called his private opinion, yet as it was formed by him on a subject which *he had so thoroughly considered, and as the general convenience of the case coincides with it, it is entitled to our best consideration : therefore, with no decided authority, or general principle of law against us, but with the convenience of the case and general principles of law in our favour, we shall do more substantial justice to the parties in this particular case, and to the public in general, by refusing to grant this writ of mandamus, and by referring this question to the Lord Chancellor, than by entertaining jurisdiction over it.

Rule discharged.

1791.

May 26.

[247]

WICKS v. FENTHAM AND ANOTHER.

(4 T. R. 247—248.)

An action lies for a malicious prosecution, though the plaintiff be acquitted on a defect in the indictment.

THIS was an action for a malicious prosecution ; at the trial of which, at the Westminster Sittings after last term, before Lord Kenyon, it appeared, That the defendants had indicted the plaintiff, as constable, for having permitted a prisoner to escape out of his custody ; upon which indictment he had been acquitted, because he was a headborough, and not a constable. It was objected by the defendant's counsel : That this action could not be maintained, because the plaintiff had not been acquitted on the merits ; and Lord KENYON nonsuited the plaintiff, on the authority of a case at the Monmouth Assizes, 1768, before ASTON, J. who thought, That, in order to entitle the plaintiff to recover in an action for a malicious prosecution, it ought to

appear, by the opinion of the jury, that on the merits there was no foundation for the original prosecution.

1791.
WICKS
v.
FENTHAM.
[248]

Erskine obtained a rule on a former day, to shew cause why the nonsuit should not be set aside, and a new trial granted, on the authority of *Chambers v. Robinson*,* where this precise point was determined, as well on authority † as on reason; and where the Court said, that “a bad indictment served all the purposes of malice, by putting the party to expense and exposing him, but that it served no purpose of justice in bringing the party to punishment, if he were guilty.”

Mingay and *Garrow* were now to have shewn cause; but

The Court were of opinion, That they were bound, by the cases of *Chambers v. Robinson* and *Jones v. Gwynn*, to make the

Rule absolute.

LIDDERDALE v. THE DUKE OF MONTROSE AND
LORD MULGRAVE, PAYMASTERS GENERAL OF
THE ARMY.‡

1791.
May 26.

(4 T. R. 248—251.)

The future half-pay of an officer is not assignable.

* * * At the trial of this cause, before Lord Kenyon at the last sittings at Westminster, it was agreed that a verdict should be taken for the plaintiff, with liberty to move the Court to set it aside and enter a nonsuit, if they should be of opinion that by law an assignment by an officer of his half-pay is good, and will warrant the paymaster-general, upon due notice of such assignment, to withhold payment of the same to the officer: for

[249]

* 1 Str. 691.

† *Jones v. Gwynn*, Gilb. 185 and 10 Mod. 148, 214.

‡ *Lucas v. Harris* (1886) 18 Q. B.

D. 127; 56 L. J. Q. B. 15; *Crowe v. Price* (1889) 22 Q. B. D. 429; 58 L. J. Q. B. 215.

1791.
 LIDDERDALE
 v.
 THE DUKE OF
 MONTROSE.
 [*250]

it if were good, then the plaintiff was not entitled to recover, it being proved that he had *regularly assigned the same by a letter of attorney, dated in November, 1788, to another person for a valuable consideration, whose demand was not yet liquidated.

A rule to that effect having been accordingly obtained,

Erskine and *Bower* now shewed cause ; and relied on the case of *F'larty v. Odum*,† as deciding the present ; which, they observed, was determined by the Court on great deliberation ; and after having attentively considered the case of *Stewart v. Tucker*, in 2 Bl. Rep. 1187, and all the other cases on the subject,

[*Bearcroft* and *Wood*, *contrà*, relied upon the case of *Stewart v. Tucker* (*supra*, *cit.*)]

The Court said, That, on the best consideration which they had been able to give to this question, they saw no reason to retract the opinion which they had delivered in *F'larty v. Odum* : that on principles of public policy, as well as on account of the interest of the officers themselves, they were clearly of opinion, that by law such assignments were void : that the half-pay of the officers was not only a chose in action, but that, with respect *to such payments as were not due, it was also contingent whether or not they would ever be made. But they hinted that the assignee might maintain an action against the assignor on his covenant.

[*251]

† 3 T. R. 681 ; R. R. vol. i. p. 791.

SYEDS *v.* HAY.

(4 T. R. 260—264.)

1791.
May 26.

When the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, the owner upon demand and denial may maintain trover against the captain, unless the latter can establish the wharfinger's rights. [See *Rogers v. Lambert* (C. A. 1890), 24 Q. B. D. 573; 59 L. J. Q. B. 259, and cases there cited.]

TROVER for certain goods. The action was brought by the owner against the captain of the vessel in which they had been shipped; and the only question was, Whether there was evidence of a conversion to maintain this action? The *goods were left by the defendant in the hands of one Hawley, a wharfinger, for the plaintiff's use; and he might have had them at any time by sending there and paying the wharfage. But, previous to their being landed on the wharf, the plaintiff, intending to convey them from the vessel himself, expressly directed the defendant not to land them there; which the latter promised not to do, but nevertheless he did so. The defendant, by way of justification for this breach of orders and promise, attempted to set up a usage that every wharfinger, against whose wharf a vessel was moored for the purpose of unloading, as in the present case, was intitled to the wharfage fees for all goods unloaded therefrom, whether landed on the wharf or not; and that therefore the wharfinger had a lien thereon, of which it was not lawful to divest him. It appeared from several witnesses, who were examined as to this usage, that a claim of this kind had been made by the wharfingers in the port of London, which had sometimes been paid, and sometimes not; but, in their opinion, it was well founded: and, at all events, there was a reasonable ground from the evidence to suppose that the captain in this instance had acted from an impression that the wharfinger had such a right. Lord KENYON was of opinion, on an objection taken at the trial, That there was no evidence of a conversion; for, without laying stress on the supposed usage, the goods had

[*261]

1791.
 SYEDS
 v.
 HAY.

been delivered to the wharfinger for the use of the defendant; and that the proper remedy against a carrier for not delivering goods pursuant to orders, was by action on the case; but he nevertheless permitted the cause to proceed; reserving this point for the consideration of the Court. The verdict was given for the plaintiff: and a rule having been obtained to shew cause why the verdict should not be set aside, and a nonsuit entered, [the question was argued, and the Court delivered judgment as follows:]

[263] LORD KENYON, Ch. J.:

It is clear that the plaintiff is entitled to recover either against the defendant or the wharfinger: and if no wharfage be due, of which there was no satisfactory evidence, I think that this action may be maintained against the defendant.

ASHHURST, J.:

If the wharfage duty be not due, it is clear that trover will lie against the defendant. Or even if the defendant landed the goods on the wharf with the view of sheltering himself from the payment of the moorage duty, that also would subject him to this action.

BULLER, J.:

[*264] I am of opinion that the objection to the form of the action is not well founded. For the plaintiff gave express orders to the defendant not to land the goods on the wharf; to which the latter agreed at the time, but afterwards disobeyed *those orders, and delivered the goods into the possession of the wharfinger: now on these facts I think that trover will lie. I cannot go on the ground that the wharfinger was the plaintiff's agent: for, so far from it, the plaintiff expressly dissented to the goods being sent there:—and if one man, who is entrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion. If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him and paying for the keeping of him, yet it brings a charge on me. So here the defendant, by

putting these goods into the custody of the wharfinger, brought a charge on the plaintiff. And this is a deliberate act, it being done contrary to the orders of the owner, and therefore distinguishable from the case put at the bar of a misdelivery of goods, merely owing to a mistake. So stands the case independently of the evidence respecting the wharfage: but that is very material to be considered; because if the wharfage duty be due, that will be an answer to the present action. The usage set up at the trial does not appear to be uniform; for, though several of the witnesses said, that in their opinion it was due, yet opinion is no evidence; and in point of fact, the duty has not always been paid in cases where the goods were not landed. The case in Bl. Rep.† goes a great way to prove that no such payment can be exacted.

1791.
SYEDS
v.
HAY.

GROSE, J. of the same opinion.

On a subsequent day Lord KENYON said, that the Court had fully considered this case, and were opinion that no new trial ought to be granted, and that the rule should be discharged.

DOE ON THE DEMISE OF PHILLIPS *v.* ALDRIDGE.
(4 T. R. 264—266.)

1791.
May 31.
[264]

A. devised to B. preacher of the meeting-house of C. for life, on condition that he should convey the premises to trustees to take place after B.'s death for the use and support of the preaching the word of God at the meeting-house for ever; and in case the preaching there should be discontinued, then over to a charity-school; held that B. took an estate for life, though the devise over, after his death, would be void by the Statute of Mortmain (9 Geo. II. c. 36).

At the trial of this ejectment, for a house and ground belonging to it, at the last Winchester Assizes before Perryn, B. a verdict was taken for the plaintiff, subject to the opinion of this Court on a case reserved. The plaintiff claimed as the heir-at-law, the defendant as the devisee, of W. Phillips; who devised thus: "To the Reverend Adam Aldridge, late of Amesbury *in

[*265]

† *Stephen v. Coster*, 1 Bl. Rep. 413, 423.

1791.
DOE
 v.
 ALDRIDGE.

Wiltshire, but now preacher at the Meeting-house in Lyndhurst, All, &c. (describing the premises) To hold to him the said Adam Aldridge for and during his natural life only, on this express condition, that he do and shall without delay after my decease, settle and convey the same to trustees, to take place at his decease for the use and support of the preaching of the word of God at the meeting-house at Lyndhurst aforesaid for ever; and in case such preaching should be discontinued, I direct the same to be applied towards a school for teaching the poor children of Lyndhurst aforesaid for ever. And I do hereby give unto the said A. Aldridge full and absolute power and authority to settle the same accordingly." Then followed a bequest of money in the funds to the same uses; legacies of 100*l.* to the defendant and the other executor, for their trouble in executing the will; and a bequest of the household furniture in the house in question to the defendant for life, with a direction to settle the same to the use of the succeeding ministers, to go as heir-looms: and, besides some other legacies, the will contained the following clauses: "And I further expect that he (the defendant) will, with the help of God, after my decease, without delay, settle and forward every thing in his power to promote and carry on the work of God at Lyndhurst aforesaid, both in his lifetime and after his decease."—"And if it should so happen that I have not left any of the aforesaid legacies in a lawful and legal manner, to prevent any advantage being taken thereof, I do hereby give, devise, and bequeath, such legacy or legacies unto the said W. Downer and A. Aldridge, in trust, to be disposed of by them at their discretion for ever."

Durnford, for the plaintiff, contended, that not only the limitation subsequent to the defendant's life-estate, but that the life-estate also was void by the 9 Geo. II. c. 36, as being a devise to a charitable use. * * * * He was stopped by

266] The Court,* who thought the point too clear for discussion. For that though the subsequent limitation was void, the defendant's life-estate was clearly good; that the religious persuasion

* Absent, Ashhurst, J., and Buller, J.

of the defendant raised no ground of objection to his taking the estate; and that the devise over to the school, in case the preaching should be discontinued, only related to the limitation after the defendant's death.

1791.
DOE
v.
ALDRIDGE.

THE KING v. BOUGHEY AND OTHERS.

(4 T. R. 281—282.)

1791
June 6.
[281]

The party prosecuting a *certiorari* to remove a conviction, &c. must himself enter into a recognizance with other persons to prosecute it with effect, &c. by the 5 Geo. II. c. 19, s. 2. A *certiorari* to remove a conviction must, by 13 Geo. II. c. 18, s. 5, be applied for within six months after the date of such conviction.

On the 7th of July, 1790, the defendants were convicted in certain penalties under the Conventicle Act†; on the 14th of July the magistrate issued a summons or order requiring them to pay the penalties: On the 12th January, 1791, two persons, having entered into recognizance to prosecute with effect, &c. obtained a *certiorari* to remove the conviction into this Court; to set aside which writ a rule was obtained on two grounds; first, That the defendant had not given the security required by the 5 Geo. II. c. 19, s. 2; which enacts, That no *certiorari* shall be allowed to remove any judgment or order of justices, unless the party prosecuting such *certiorari*, before the allowance thereof, shall enter into a recognizance with sufficient sureties, &c. in 50*l.* with condition to prosecute the same without delay, and to *pay costs if the judgment or order be confirmed. And secondly, Because the *certiorari* was not moved for within the time allowed by the 13 Geo. II. c. 18, s. 5; which directs that no *certiorari* to remove convictions, &c. before justices of the peace shall be issued, unless it be applied for within six calendar months next after such conviction, judgment, order, or other proceedings, shall be so had or made.

[*282]

Erskine, in support of the rule, observed, first, That the words of the 5 Geo. II. c. 19, were positive, and required at least

† 22 Car. II. c. 1.

1791.
THE KING
v.
BOUGHHEY.

two sureties in addition to the recognizance of the party himself, who prosecuted the *certiorari*; whereas in this case there were only two sureties, exclusive of the parties themselves. And, secondly, That more than six months had elapsed between the date of the convictions and the time of suing out the *certiorari*.

Bearcroft and *Leycester*, *contra*, insisted, that under the 5 Geo. II. it was not necessary for the person convicted to give security, it being sufficient if the party who prosecuted the *certiorari* did so; and said, that according to the constant and uniform practice of the Crown Office,* two sureties only were sufficient. In answer to the second objection, they observed, that the writ was sued out within six months after the order of the magistrate, by which the defendants were required to pay the penalties. But

The Court thought that both the objections were well founded. First, That the words of the 5 Geo. II. c. 19, were positive,† and could not be dispensed with. And, secondly, That the *certiorari* ought to have been applied for within six months after the conviction.

Rule absolute.

* In which the officers of the Crown Office agreed.

† *Vid. R. v. The Justices of Glamorganshire*, 5 T. R. 279.

K. B. TRINITY TERM.

THE KING *v.* JOLLIFFE.

(4 T. R. 285—293.)

1791.
June 25.

[285]

A criminal information having been granted against the defendant, he, before the trial at *nisi prius*, distributed handbills in the assize town, vindicating his own conduct, and reflecting on the prosecutor's; this matter being disclosed to the Judge at *nisi prius* by an affidavit, was held a sufficient ground to put off the trial.—And that affidavit being returned to this Court, they granted another information on it against the defendant; considering the affidavit, taken at *nisi prius*, as taken under the authority of this Court.

AN information having been granted against the defendant in Michaelmas Term last for a misdemeanour, as a magistrate, it went down to be tried before Gould, J. at the last Surrey assizes; when an application was made to him to put off the trial upon the affidavits of Mr. Smith, Dr. Weller, and Mr. Barnes. The first of whom deposed, that three days before, the defendant at Kingston, where the assizes were held, gave him four printed papers, one of which was annexed, and asked him whether he had seen any of those papers. That when the deponent received them he was about to read one, when the defendant desired he would put them in his pocket; which he did; and that he afterwards delivered one of them to Dr. Weller at his request; but had not till the present occasion had any conversation with any person concerning the contents. The affidavits of Dr. Weller and Mr. Barnes confirmed the receipt of the paper by the former from Mr. Smith, in the manner stated by Mr. Smith; and it also appeared from Dr. Weller's affidavit that he had delivered the papers so received from Mr. Smith to Mr. Barnes, solicitor for the prosecutor, without knowing the contents. The substance of the paper so delivered was a vindication by the defendant of his conduct *upon the charge contained in the information then pending, and an imputation of malicious motives in the prosecutor. Upon these affidavits the trial was put off, on the motion of the prosecutor's counsel, suggesting that the papers

[*286]

1791.
THE KING
v.
JOLLIFFE.

had been published with a view of prejudicing the trial; and the affidavits were returned into this Court by the associate.

In the last term an application was made to this Court and a rule *nisi* was granted for another information against the defendant, upon the affidavit of Mr. Barnes, stating, that the former trial had been postponed on the ground of the matters disclosed in the above affidavits of Mr. Smith and Dr. Weller, which were annexed thereto, together with the printed paper in question, and that Mr. Smith and Dr. Weller when requested to make affidavits to the same effect as before for supporting this application to the Court had declined doing it. Mr. Barnes then deposed, as before, that he had received the printed paper annexed to the affidavit sworn at the assizes from Dr. Weller, who said he had received the same from Mr. Smith, and that he had heard Smith say what he had afterwards sworn in Court, that he had received four of the said printed papers from the defendant at Kingston. There was also the usual affidavit from the prosecutor Mr. Fanshawe, denying the suggestions contained in the paper as far as respected himself, and that he did not make the application from any malice against the defendant.

[The points taken in the argument on the rule will appear from the judgment of]—

[288] LORD KENYON, Ch. J. :

Before I give opinion on the principal question in this case, I cannot but express my entire concurrence with what was done by the learned Judge before whom the former information was to be tried. It appeared to him by the affidavits then made, and which are since transmitted to this Court, that, during the course of the assizes where the record was sent down for trial, certain papers were distributed by the defendant, which could not have been done with any other view than that of influencing those who were to decide on the question then in agitation. If there never had been any precedent before, it is impossible, I think, that any Judge, who wished to administer upright justice, could hesitate what step to take on such an occasion. But the case has happened before,* and in this same county,

* *R. v. Martha Gray*, 1 Burr. 510.

where papers having been distributed by the prosecutor to influence the decision of a popular question, a right of way claimed through Richmond Park, the prosecutor's own counsel moved to have the trial postponed, which was accordingly granted.

1791.
THE KING
v.
JOLLIFFE.

With respect to the principal question, we are not now to determine Whether or not the defendant be guilty of the offence which is imputed to him? but merely Whether sufficient matter appear to warrant us in putting the guilt or innocence of the defendant into a constitutional course of trial? Before we send it down to be tried, it is necessary for us to be convinced that the *corpus delicti* stands established. Now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecutor would of itself warrant us to grant the information: but that is a minor offence, when compared with that of publishing the papers in question during the pendency of the cause at the assizes, and in the hour of trial. It is the pride of the constitution of this country that all causes should be decided by jurors, who are chosen in a manner which excludes all possibility of bias, and who are chosen by ballot, in order to prevent any possibility of their being tampered with. But if an individual can break down any of those safeguards which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And therefore I cannot forbear saying, that if the publication be brought home to the defendant, he has been guilty of a crime of the greatest enormity. But it has been objected that the publication was extorted; to which I answer, That it was not extorted from the defendant; he was a volunteer *in the business; he voluntarily delivered four of these printed papers to Smith, introducing the conversation with a question to Smith, whether he had before seen any of them; which was a direct avowal of the publication. And it is not necessary in a prosecution for a libel to prove a publication to several persons; publication to one is all that is required. Then the only remaining question is, Whether or not there be any legal evidence before the Court to affect the defendant with this charge? Before

[*290]

1791.
 THE KING
 v.
 JOLLIFFE

the statute 4 & 5 W. & M. c. 18, it was in the power of any individual to file an information, without disclosing to the Court the grounds on which it was exhibited. But that practice being attended with the inconveniences recited in the preamble to that statute, it was enacted, that no information should be filed without the express order of the Court publicly given. That statute does not enumerate the grounds which are sufficient to enable us to grant the information, but the Legislature left it to our discretion, trusting that we should not so far transgress our duty as to go beyond the rules of sound discretion. In ordinary cases affidavits are sworn in the Court for the express purpose of praying an information upon them: but that does not preclude us from granting an information on affidavits equally authentic, although not made for that purpose. It has been said, that in no case whatever can the proceedings in one cause be made use of in another: but the contrary is in every day's practice. In the Court of Chancery depositions taken in one cause are frequently read in another, saving all just exceptions, as that they are not between other parties, &c. So, in Courts of law, the evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the interim†; as I remember was agreed on all hands on a trial at bar in the instance of Lord Palmerston; but as the person who wished to give Lord Palmerston's evidence could not undertake to give his words, but merely to swear to the effect of them, he was rejected. So also when a motion is made in this Court to set aside interlocutory proceedings on affidavits which disclose criminal matter against an attorney or any other officer of the Court, the Court perpetually directs a criminal inquiry into the conduct of such officer, although the affidavits be filed without any view to any criminal proceedings. Again too, when affidavits are made in this Court, impeaching the conduct of magistrates, they are frequently ordered to be laid before the Lord Chancellor, to enable him to judge whether *or not such magistrates ought to be continued in the commission of the peace. We have also been furnished with a note, taken by an officer of the Court, in which Mr. Bower, who had moved in a cause of *Cooke v. Schmoll* for

[*291]

† *Vid.* Bull. N. P. 242.

the defendant's discharge upon affidavits filed in that cause, afterwards moved again on reading those affidavits and others filed in the cause of *Da Costa v. Schmoll* for his discharge also in the latter; and the clerk of the rules doubted as to drawing up the rule upon affidavits which had not been filed in the latter cause; but we were of opinion that, being filed regularly in the first cause, they might be read as the foundation of the rule in this, and directed him to draw up the rule accordingly. In short, all that is required in an affidavit, as the foundation for a criminal information, is that which is required in every other cause, that the affidavit be made in a judicial proceeding, where the party swears at the hazard of a prosecution for perjury, if it be false. Now these affidavits were taken before a Judge who had authority to administer an oath, they were made in the course of a judicial proceeding, and relevant to the material point in issue. And the original affidavits are now before us on the files of the Court, for they were transmitted here by the officer of the Court below. It is not necessary for us to decide whether those affidavits were taken under the authority of this Court, though I confess I have a strong opinion on that point. The judges at *nisi prius* try the causes upon records issuing out of the several Courts of Westminster, which are returned to the several Courts out of which they issue. In cases sent from the Exchequer, I believe a commission goes to try each cause. So too in Chester the record is sent down by *mittimus*. And this is in substance the same. However, I do not ground myself on that point: I am satisfied that there is sufficient ground for this Court to grant an information on the affidavits now before us, without referring to the authority under which Mr. Justice Gould sat. Upon the merits I will not now give any opinion; but it would be a discredit to the administration of justice if we were to refuse granting an information on the evidence laid before us.

1791.
THE KING
v.
JOLLIFFE.

ASHHURST, J., BULLER, J., and GROSE, J. [concurred], and the [291—293]
rule was made absolute.

1791.
June 28.
 [294]

DOE, ON SEVERAL DEMISES OF COOPER AND WIFE, AND
 SUSANNAH HEAD, AND ELEANOR HEAD, v
 COLLIS.

(4 T. R. 294—300.)

Issue is either a word of purchase or limitation as will best effectuate the devisor's intention. Therefore where A. devised his estate to his two daughters to be equally divided between them, one moiety to one and her heirs, and the other moiety to the other for life, and after her decease to the issue of her body and her heirs for ever, and she had one child living at the time of the devise, the second took only an estate for life, with remainders to her children, as purchasers.

J. NEWSOM, being seised of certain lands in Cambridgeshire, in January, 1761, devised them to his wife during the term of her natural life only; remainder "to his daughters Eleanor Newsom and Susannah the wife of William Head, to be equally divided between them, not as joint-tenants, but as tenants in common, viz. the one moiety, or half part thereof, to his daughter Eleanor Newsom and her heirs for ever; and the other moiety to his daughter Susannah, the wife of William Head, during the term of her natural life; and after her decease to the issue of her body lawfully begotten, and their heirs for ever." The devisor died in 1762; and his wife in 1772. William and Susannah Head had three daughters, who are the lessors of the plaintiff, namely, Elizabeth (the wife of W. Cooper) born in November, 1755; Susannah, born in May, 1762; and Eleanor, born in May, 1768. In Trinity Term, 1771, William and Susannah Head, for the purpose of barring all estates tail, levied a *fine sur conusance de droit come ceo*, &c. of the moiety of the premises so devised to Susannah; the uses of which were declared to be to W. Head in fee; and under that fine the defendant claims. Susannah, the wife of W. Head, died in August, 1775; and W. Head, her husband, in November, 1777.

Woodroffe, for the plaintiff, contended, that Susannah Head took an estate for life only, with vested remainders to her children as purchasers. * * *

**Wilson*, for the defendant, contended, first, that issue in a will, when used in the plural number, must be considered to be a word of limitation, unless coupled with other words to shew a different intention, and that to the present will there were no such words to satisfy the Court that it was used as a word of purchase. * * *

1791.
DOE
v.
COLLIS.
[*295]

Woodroffe, [in reply,] was stopped.

[299]

LORD KENYON, CH. J. :

On the general question, the decision which we shall give will not disturb the authority of a single case that has been cited : but considering them altogether, I think this proposition is to be collected from them : That in a will "issue" is either a word of purchase or of limitation, as will best answer the intention of the devisor, though in the case of a deed it is universally taken as a word of purchase. Now in this case there is no doubt about the intention of the devisor, who "devised all his real estate unto his wife for her life, and after her decease to his daughters Eleanor and Susannah, to be equally divided between them, not as joint-tenants, *but as tenants in common ;" and then he proceeds to shew how their issue should take, viz. "The one moiety to his daughter Eleanor and her heirs for ever, and the other moiety to his daughter Sus. Head for life, and after decease to the issue of her body lawfully begotten, and their heirs for ever." Then how will this general intention, so declared, be best answered by the subdivision between the issue of the two daughters ? The first moiety is given to one daughter and her heirs for ever : the other to another daughter for life, then to her issue, and their heirs for ever. Now if the devise of the second moiety be construed to give an estate tail to that daughter, the devisor's estate will not be equally divided ; for then the ultimate reversion of the second moiety will be again subdivided between the heirs of the two daughters ; and the first daughter and her heirs will take a moiety of this reversion over and above what they take under the devise of the first moiety of the whole. In some cases, such as *Doe d. Long v. Laming*, the words "heirs of the body" have been restrained in this way ; and they always

[*300]

1791.
DOE
v.
COLLIS.

give way with greater difficulty than the word "issue." Therefore without disputing any of the cases cited, but, on the contrary, in conformity with them all, and relying upon them for the foundation of this judgment, namely, that the intention of the devisor must prevail, I am of opinion that the devisor in this case used issue as a word of purchase; and consequently that the children of Susannah Head, who, it is to be observed, were all *in esse* when the fine was levied, took a fee; but on the other point, which is merely a question of form, and which was not made below, I think the defendant ought not now to be permitted to take the objection.

ASHHURST, J.* and GROSE, J. concurred.

1791.
June 28.

DOE, ON THE DEMISE OF COUNT DUROURE, *v.* JONES.

(4 T. R. 300—312.)

When once the five years allowed to an infant to make an entry for the purpose of avoiding a fine, begin, the time continues to run, notwithstanding any subsequent disability. The same principle applies as to disability under all the Statutes of Limitations.

[A SPECIAL verdict in this ejectment was found at the last Surrey assizes: stating facts which raised the question whether the plaintiff was debarred from recovering by reason of alienage;† and the following further facts on which the question was debated whether his claim was barred by a fine:] In Trinity Term 1775, a *fine sur conusance de droit come ceo*, &c. was levied of the same between C. Langlois plaintiff, and the defendant deforciant; and the last proclamation of that fine was in Easter Term, 1776. The lessor of the plaintiff, when the fine was levied and proclaimed, was an infant, but attained the age of 21 on the 26th

* Absent Buller, J.

† The question of alienage is practically obsolete by reason of the Naturalization Act, 1870 (33 & 34 Vict. c. 14). The latest case under

the old law, where the effect of the older statutes and authorities is discussed, is *De Geer v. Stone* (1882) 22 Ch. D. 243; 52 L. J. Ch. 57.—R. C.

of February, 1784; he was then at large in England, and continued so to be until the 17th of December, 1784, when he *was arrested, and imprisoned for debt, and was kept and detained in prison continually from that time until the 16th of September, 1789; and on the 17th day of that month, he, claiming title to the premises in question, made an actual and personal entry thereon in due form of law to avoid the fine, and ejected the defendant, &c.

1791.
DOE
v.
JONES.
[*302]

Marryat for the plaintiff:

* * * With respect to the fine, the question will turn on the second branch of the statute 4 Hen. VII. c. 24†; the first part of which enacts, That all persons shall be bound by the fine, as well privies as strangers, “except women covert (other than parties to the fine), persons within the age of twenty-one years, in prison, &c. saving to every person, except the parties thereto, their right, provided they prosecute it within five years.” Now the lessor of the plaintiff cannot be bound by that clause, because he falls expressly within one of the exceptions, being an infant at the time of levying the fine; and all the cases in which it has been adjudged, that if the party be not within one or other of the exceptions at the time, no subsequent disability shall impede the progress of the fine against him, apply solely *to the construction of this first branch of the clause, and do not conclude this question. Then the statute proceeds to enact concerning the time within which the persons included in the former exception shall make their claim; and it ordains that “all such persons as be covert *de baron* [not party to the fine], and every person within age of twenty-one years, in prison, or out of this land, or not of whole mind, at the time of the said fine levied and ingrossed, and by this act afore exempt, having any right, &c. shall take the said actions, &c. within five years next after they come and be of age of twenty-one years, out of prison, uncovert, within this

[303]

[*304]

† The practice of levying fines having ceased by reason of the Act 3 & 4 Wm. IV. c. 74, s. 2, this statute of 4 Hen. VII. was repealed as

having become obsolete or unnecessary, by the Statute Law Revision Act, 1863.—R. C.

1791.
DOE
v.
JONES.

land, and of whole mind," &c. Upon this clause the question arises: * * * Whether, after the first disability be removed, a second disability arising shall stop the progress of the fine during the continuance? * * * This question was touched upon in *Stowel v. Lord Zouch**; but as there are contradictory *dicta* there by the Judges, who were divided in their opinions, the question still remained undecided. There is, however, a passage in *Shep. Touch.* 30, from whence it should seem that the party is not bound by the fine, unless he have five entire years to make his claim free from any of the disabilities mentioned in the act, except where such disability is incurred by his own voluntary act; for, speaking of absence out of England, it says, that if a party be in England at the time of the fine levied, and after go beyond seas, and suffer the five years after the proclamation to pass, in this case he shall have no longer time, except he be sent in the king's service and by his commandment: * * *

[305]
[306]

Shepherd, for the defendant :

* * * By the general clause, 4 Hen. VII. c. 24, all mankind would have been barred by the fine, unless the saving clauses had been added: and the exception in favour of infancy is (with some others) allowed, "so that they or their heirs take their said actions, or their lawful entry according to their right and title, within five years next after they come and be at their full age, out of prison," &c. But the saving operates only on condition that the party prosecute his right within five years after the disability is removed: here the disability of infancy was removed in February, 1784, and the lessor of the plaintiff made no entry to avoid the fine till September, 1789. The five years then began the instant he was of age, and continued to run notwithstanding the subsequent imprisonment. That when the disability is removed, the time begins and continues to run is clear, from the opinion of the majority of the judges in *Stowell v. Lord Zouch*,† and from the decision of this Court in *Doe d. Griggs* and another v. *Shane*.‡

* Plowd. 366 and 375.

† Plow. 355.

‡ 4 T. R. 306, n.

**Marryat*, in reply. * * *

1791.

 DOB
 v.
 JONES.
 [*307]
 [310]

LORD KENYON, Ch. J. :

* * * I confess I never heard it doubted till the discussion of this case, whether, when any of the Statutes of Limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am very clearly of opinion on the words of the Statute of Fines, on the uniform construction of all the Statutes of Limitations down to the present moment, and on the generally received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine, and to make nice distinctions between the cases of voluntary and involuntary disabilities; but in both cases when the disability is once removed, the time begins to run.

ASHHURST, J. :

* * * On this point I also concur with my Lord. Our decision is warranted by the uniform construction which has been put upon this statute; and a contrary determination would be productive of all those mischievous consequences which the different Statutes of Limitations intended to prevent. If the disability be once removed, the time must continue to run notwithstanding any subsequent disability, either voluntary or involuntary; and even if there were any distinction between the two kinds of disability, the present is *against the plaintiff; for the imprisonment for debt was in consequence of his own voluntary act.

[*311]

GROSE, J.† :

* * * I have no doubt on the point relative to the fine. The words of the statute are clear in themselves; and there is a passage in Shep. Touchst. 30, which is decisive of the question. It is there said, "If they be in England at the time of levying the fine, and after go beyond the seas, and suffer the five years after the

[312]

† Mr. Justice Buller was sitting for the Lord Chancellor.

1791.
DOE
v.
JONES.

proclamations to pass,—in this case they shall have no longer time, except they be sent in the king's service and by his commandment." But here I consider the lessor of the plaintiff as having brought this disability on himself.

1791.
June 30.

BALL v. DUNSTERVILLE AND ANOTHER.

(4 T. R. 313—314.)

[313]

If A. execute a deed for himself and his partner, by the authority of his partner and in his presence, it is a good execution, though only sealed once.

THIS was an action on a bill of sale; and the declaration stated, that by a certain bill of sale made by the defendants, sealed with the seal of one of them for and on behalf of himself and the other, and by the authority of the other, &c. Plea, *Non est factum*. At the trial at the last Exeter Assizes before Perryn, B. it was proved that one of the defendants, in the presence of the other and by his authority, executed the instrument for them both, they being partners in this transaction; but there was but one seal; and it did not appear that he had put the seal twice upon the wax. It was objected on the part of the defendants: that the instrument was not properly executed, for that they (not being a corporation) could not have a common seal; that the execution by one could not operate as an execution by both, even though they both consented; and that the authority given by one to the other to execute a deed, should itself have been conferred by deed. The learned Judge over-
[*314] *ruled the objection, and the plaintiff obtained a verdict; to set aside which a rule was obtained in the last term.

Bearcroft and *Lawrence*, Serjt. now shewed cause; and relied upon *Lord Lovelace's* case;† where it was said, That "if one of the officers of the forest put one seal to the rolls by assent of all the verderers, and other officers, it is as good as if every

† Sir W. Jones, 268.

one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all." And they observed that this was a stronger case, because this instrument was executed by one defendant in the presence of the other. But even if it were necessary that the one who did execute should have affixed the seal twice to the wax in order to execute for himself and his partner, it did not appear negatively that it was not done in this case.

1791.
BALL
v.
DUNSTER-
VILLE.

Bower, Rooke, Serjt. and Gibbs, contra, said, That though the defendant, who executed the deed, might have executed for himself and his partner, by putting the seal on the same wax, yet that he should actually have executed it twice; first for the one and then for the other; whereas here, he had only executed and delivered it once, which could not be taken to be the execution of both. But

The COURT were clearly of opinion that there was no ground for the objection; that no particular mode of delivery was necessary, for that it was sufficient if the party executing a deed treated it as his own. And they relied principally on this deed having been executed by one defendant for himself and the other in the presence of that other.

Rule discharged.

CHORLEY, M.D. v. BOLCOT, EXECUTOR.

(4 T. R. 317—318.)

A physician cannot maintain an action for his fees.*

1791.
June 30.
[317]

THE plaintiff, who was a physician, living at Doncaster, brought this action for fees, for attending for a considerable time on the defendant's testator, who lived at some little distance from the town; and the evidence was, that at Doncaster and its neighbourhood there was no certain rule about fees; but the general practice was for a physician to receive two guineas a-week for

* See the Medical Act, 1886, s. 6.

1791.
 CHORLEY
 v.
 BOLCOT.

his attendance. The plaintiff obtained a verdict at the last Assizes at York; to set aside which,

Wood obtained a rule *nisi* last term, on the ground that no action lay for a physician's fees any more than for a barrister's.

Cockell, Serjt., and *Chambre*, now shewed cause; observing, that though this point had been ruled several times at *nisi prius* against such a claim, yet it had never been solemnly decided; nor was there any authority in the books for putting the claim of a physician's fees upon the same footing as those of a barrister. In the latter case it might originally have been proper that no temptation should be held out to countenance injustice: but in the former it would be equally impolitic that those who are frequently put to expense in attending patients at a distance, and who are liable to make reparation to those who may suffer by their want of skill, should not be certain of a just and honourable reward. The regulation with regard to barristers is founded on grounds of public policy, as appears by the passage in Tacitus, to which Mr. J. BLACKSTONE† refers; but they are totally in-

[*318]

LORD KENYON, Ch. J. :

I remember a learned controversy some years ago as to what description of persons were intended by the *Medici* at Rome; and it seemed to have been clearly established by Dr. Mead, that by those were not meant physicians, but an inferior degree amongst the professors of that art, such as answer rather to the description of surgeons amongst us; but at all events it has been understood in this country that the fees of a physician are honorary, and not demandable of right; and it is much more

† 3 Bl. Com. ch. 3, in note.

for the credit and rank of that honorable body, and perhaps for their benefit also, that they should be so considered. It never was yet heard of that it was necessary to take a receipt upon such an occasion; and I much doubt whether they themselves would not altogether [dis] claim such a right as would place them upon a less respectable footing in society than that which they at present hold.

Per CURIAM :

Rule absolute.

CHEETHAM v. HAMPSON.

(4 T. R. 318—320.)

An action on the case for not repairing fences, whereby another party is damnified, can only be maintained against the occupier, and not against the owner of the fee, who is not in possession.†

THIS was an action on the case against the defendant, who was owner of the fee, for not repairing the fences of a close, whereby the plaintiff was damaged, &c. At the trial before Thomson, B., at the last assizes for Lancaster, it appeared that another person was tenant in possession under the defendant; whereupon it was objected that the action did not lie against the present defendant. The learned Judge would not nonsuit the plaintiff, and a verdict was taken for him; but he gave leave to the defendant's counsel to move the Court to set that verdict aside and to enter a nonsuit, if they should be of opinion that the objection was well founded. A rule *nisi* having been obtained for that purpose last term,

Law now shewed cause against it; contending, that from all the old authorities it appeared that the burthen of repair lay upon the owner of the fee; and that the cases which shew that the occupier also is liable, only prove that the same burthen *may be extended to him, but do not shew that the party injured by the neglect to repair may not elect to take his remedy against

1791.
CHORLEY
v.
BOLCOT.

1791.
June 30.
[318]

[*319]

† Compare *Payne v. Rogers*, 2 H. Bl. 350, reported *in loco, post*, where the landlord, being bound to repair, was held liable.

1791.
 CHEETHAM
 v.
 HAMPSON.

either. * * * He cited *Rosewell v. Prior*,† where an action on the case was maintained against the owner, who was not in possession, for a nuisance in making an erection which stopped ancient lights; and the Court held that the action lay either against him or the tenant in possession at the plaintiff's election. * * *

Cockell, Serjt., *contra*, was stopped by the Court.

LORD KENYON, Ch. J. :

It is clear that this action cannot be supported against the owner of the inheritance, when it is in the possession of another person. It is so notoriously the duty of the actual occupier to repair the fences, and so little the duty of the landlord, that, without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to the inheritance: and deplorable indeed [*320] would be the situation of landlords, if they were liable *to be harassed with actions for the culpable neglect of their tenants.

ASHHURST, J. declared himself of the same opinion.

BULLER, J. :

With respect to the case of *Rosewell v. Prior*, which is the only one cited of an action of a similar nature maintained against the owner out of possession, it is very distinguishable from the present; for there the owner let the premises with the nuisance complained of, which had been before erected upon them. That therefore was a misfeazance of which he himself had been guilty; and, say the Court, his demise affirmed the continuance of the nuisance, and therefore might be said to be a continuation of it by himself; and whatever construction the word *tenentes* may bear in the old entries in real actions, that will not affect the present question, which arises on a possessory action on the case against a wrongdoer; and the simple question is, Whether the landlord can in any sense be called a wrongdoer,

† Salk. 460.

because of the neglect of his tenant to repair? The instances of such actions as the present against owners, are where the *tenentes* and *occupatores* were the same; but the action lies against them only in the latter capacity.

1791.
CHEETHAM
v.
HAMPTON.

Rule absolute.

MASTER AND OTHERS v. MILLER.

(4 T. R. 320—347; and in error, 2 H. Bl. 140—144, and 1 Anstr. 225—231.)

1791.
July 1.
[320]

An alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration.*

THE first count in this declaration was in the usual form, by the indorsees of a bill of exchange against the acceptor; it stated that Peel & Co. on the 20th of March, 1788, drew a bill for 974*l.* 10*s.* on the defendant, payable three months after date to Wilkinson and Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of March. There were also four other counts: for money paid, laid out, and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; [and on the trial, a special verdict was found, which was, in substance, as follows:—

Peel & Co. on the 26th March, 1788, drew their bill on the defendant, payable three months after date to Wilkinson and Cooke, for 974*l.* 10*s.*

The bill, as altered in the manner hereinafter mentioned, and as now produced to the jury, was in the words and figures following:—"June 23d, 974*l.* 10*s.* Manchester, March 20, 1788. Three months after date pay to the order of Messrs. Wilkinson and Cooke, 974*l.* 10*s.* received, as advised, Peel, Yates, and Co. To Mr. Cha. Miller, C. M. 23d June,

* The rule of the common law established in this case is now modified by the proviso added to the section of the Bills of Exchange Act, 1882, which embodies the rule (45 &

46 Vict. c. 61, s. 64 (1)). Mr. Chalmers mentions that the proviso was introduced in committee to mitigate the rigour of the common law in favour of a holder in due course.—R. C.

1791.
MASTER
v.
MILLER.

1788." Peel and Co. delivered the original bill to Wilkinson and Cooke, and the bill was afterwards, and before the alteration, accepted by the defendant. Wilkinson and Cooke afterwards indorsed the bill to the plaintiffs, for a valuable consideration. The bill of exchange at the time of making thereof, and at the time of the acceptance, and when it came to the hands of Wilkinson and Cooke, bore date on the 26th day of March, 1788, the day of making the same; and after it so came to and whilst it remained in the hands of Wilkinson and Cooke, the date of the said bill, without the authority or privity of defendant, was altered by some person or persons to the jurors unknown, from the 26th day of March, 1788, to the 20th day of March, 1788. The words "June 29d," at the top of the bill, were there inserted to mark that it would become due and payable on the 23rd of June next after the date; and this alteration hereinbefore mentioned, and a blot upon the date of the bill of exchange, were on the bill of exchange when it was carried to and came into the hands and possession of the plaintiffs. The bill of exchange was on the 23rd of June, and also on the 28th of June, 1788, presented to the defendant for payment; on each of which days respectively he refused to pay.]

[321] This case was argued in Hilary Term last by *Wood* for the plaintiffs, and *Mingay* for the defendant: and again on this day by *Chambre* for the plaintiffs, and *Erskine* for the defendant.

[*322] For the plaintiffs it was contended, that they were entitled, notwithstanding the alteration in the bill of exchange, to recover according to the truth of the case, which is set forth in the second count of the declaration, namely, upon a bill dated the 26th March; which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration, *and had no concern whatever in the fraud that was meditated supposing any such appeared. * * *

[329] LORD KENYON, Ch. J. :

The question is not whether or not another action may not be

framed to give the plaintiffs some remedy, but Whether this action can be sustained by these parties on this instrument?—for the instrument is the only mean by which they can derive a right of action. The right of action which subsisted in favour of Wilkinson and Cooke, could not be transferred to the plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law. No case, it is true, has been cited either on one side or the other, except that in *Molloy*, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the Bar, which, in point of law as well as policy, ought to be applied to this case. That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanor: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanor, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the cases where the alteration was made *by accident: for here it is stated that this alteration was made while the bill was in the possession of Wilkinson and Cooke, who were then entitled to the amount of it; and from whom the plaintiffs derive title: and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs: but they establish this principle, that all written instruments which were altered or erased, should

1791.

MASTER
C.
MILLER.

[*330]

1791.
MASTER
v.
MILLER.

be thereby avoided. Then let us see whether the policy of the law, and some later cases do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of George I.,† in *Ward's* case, whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held that the principle extended to other instruments as well as to deeds; and that the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from Molloy‡ indeed, at first made a different impression on my mind: but on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself; but the party to whom it was directed, accepted it as payable at a different time, and afterwards the payee struck out the enlarged acceptance; and, on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it, "that the alterations did not destroy the bill," it does not affect this case: not an iota of the bill itself was altered; but on the person to whom

[*331] *the bill was directed, refusing to accept the bill as it was originally drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case; at least, that none is found: but I think that, if it had been done by accident, that should have been found, to excuse the party, as in one of the cases, where the seal of the deed was torn off by an infant. With respect to the argument drawn from the form of the plea, it goes the length of saying, that a defendant is liable, on *non*

† 2 Str. 747, and 2 Lord Raym.
1461.

‡ *Price v. Shute*, E. 33 Car. 2, in
B. R. 2 Moll. c. 10, s. 28.

assumpsit, if at any time he has made a promise, notwithstanding a subsequent payment : but the question is, Whether or not the defendant promised in the form stated in the declaration ? and the substance of that plea is, that according to that form he is not bound by law to pay. On the whole, therefore, I am of opinion that this falsification of the instrument has avoided it ; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

1791.

MASTER
v.
MILLER.

ASHHURST, J. :

It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now I cannot see any reason why the principle on which a deed would have been avoided, should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax ; and a bill of exchange, though not a deed, is evidence of a contract as much as a deed ; and the principle to be extracted from the cases cited is, that any alteration avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action : but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in possession of Wilkinson and Cooke ; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them : at all events, it was their business to preserve the bill without any alteration. If Wilkinson and Cooke had brought this action, they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody : then if the objection would have prevailed in an action brought by them, it must also hold with regard to the plaintiffs, who derive title under them. For wherever a party takes a bill under such suspicious *circumstances appearing on the face of it, it is his duty to inquire how the alteration was made ; he takes it at his risk, and must take

[*332]

1791.
MASTER
v.
MILLER.

it subject to the same objection as lay against the party from whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favour of the latter: but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange, which are daily circulated from hand to hand, should be preserved with greater purity than deeds, which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my Lord.

[BULLER, J.:

For reasons, which he stated at considerable length, was of opinion that the plaintiffs are entitled to judgment on either of these three counts in the declaration, namely, on the count on the bill of exchange, stating the date to be the 26th; or on the count for money paid; or on the count for money had and received.*]

[344] GROSE, J.:

The only question in this case is, Whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts? The first count is on a bill of exchange dated the 20th of March; but there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of March; but the defendant objects to the plaintiffs' recovering on this count also, because, the bill having been altered while it was in the hands of Wilkinson and Cooke, it is not the same bill as that which was accepted; and that is the true and only question in the cause. My idea is, that the plaintiffs' right of action, as stated in this count, cannot

* The judgment of the majority, confirmed as it is by the decision in the Exchequer Chamber, has so long been regarded as embodying the established rule of the common law, that it seems here unnecessary to set forth at length the reasons given by Mr. Justice Buller for a contrary

opinion, any more than the elaborate arguments of the counsel in the case. These will be found at length in the original reports, 4 T. R. 320, and (Ex. Ch.) 2 H. Bl. 140; and also in the first volume of "Smith's Leading Cases."—R. C.

be maintained at common law, but is supported only on the custom of merchants, which permits these particular choses in action to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson and Cooke to them, and that this was the bill which was presented when it became due. Now has all this been proved? The bill was drawn on the 26th of March, payable at 3 months' date; the defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date; but afterwards the date *was altered; the date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days: according to that alteration, the payment was demanded on the 23rd of June, which shews that the plaintiffs considered it as a bill drawn the 20th of March; then the bill which was produced in evidence to the jury was not the same bill which was drawn by Peel and Co. and accepted by the defendant; and here the cases which were cited at the bar apply. *Pigott's* † is the leading case; from that I collect, that when a deed is erased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and secondly, That when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds: but it is said that that law does not extend to the case of a bill of exchange. Whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated; namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says, That the deed thus altered no longer continues the same deed; and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is no where said that the deed is void merely

1791.
MASTER
v.
MILLER.

[*345]

† 11 Co. 27.

1791.

MASTER
v.
MILLER.

[*346]

because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal : and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument ; and this principle is founded on great good sense, because it tends to prevent the party in whose favour it is made, from attempting to make any alteration in it. This principle too, appears to me as applicable to one kind of instruments as to another ; but it has been contended that there is a difference between an alteration of bills of exchange and deeds ; but I think that the reason of the rule affects the former more strongly ; and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for 100*l.* and after acceptance the sum was altered to 1,000*l.* ; it is not pretended that the acceptor shall be liable to pay the 1,000*l.* ; and I say that he cannot be compelled *to pay the 100*l.* according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill ; and the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that *Pigott's* case only shews to what time the issue relates : but it goes further, and shews, that if the instrument be altered at any time before plea pleaded, it becomes void. It is true the Court will enquire to what time the issue relates in both cases. Then to what time does the issue relate here ? The plaintiffs in this case undertook to prove every thing that would support the *assumpsit* in law, otherwise the *assumpsit* did not arise. It was incumbent on them to prove, that before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, and refused : but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill which was accepted by the defendant, was not presented for payment ; the defendant's refusal was a refusal to pay another instrument ; and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had

been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar, that the enquiry before a jury in an action like the present should be, Whether or not the defendant promised to pay the bill at the time of his acceptance? But granting that he did so promise, that alone will not make him liable, unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my Lord on the case in Molloy: but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this Court: it only appears that there was a point made at *nisi prius*, but not that it was afterwards argued here: but it has been said that a decision in favour of the plaintiffs will be the most convenient one for the commercial world: but that is much to be doubted: for if, after an alteration of this kind, it be competent to the Court to enquire into the original date of the instrument, it will also be competent to enquire into the original sum and the original payee, after they had been altered; which would create much confusion, and open a door to fraud. Great and mischievous neglects *have already crept into these transactions; and I conceive, that keeping a strict hand over the holders of bills of exchange, to prevent any attempts to alter them, may be attended with many good effects, and cannot be productive of any bad consequences, because the party who has paid a value for the bill may have recourse to the person who immediately received it from him. On these grounds, therefore, I am of opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill.

1791.
MASTER
v.
MILLER.

[*347]

Per CURIAM :

Judgment for the defendant.

[This judgment was afterwards affirmed (after being once argued) in the Exchequer Chamber. The judgments there delivered were as follows :]

1793.]

MASTER
C.
MILLER.[2 H. BL.
143.]

LORD CHIEF JUSTICE EYRE :

I cannot bring myself to entertain any doubt on this case, and if the rest of the Court are of the same opinion, it is needless to put the parties to the delay and expense of a second argument. When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants, a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties. With respect to the argument from the negotiability of bills of exchange and their passing through a variety of hands, the inference is directly the reverse of that which was drawn by the counsel for the plaintiff: there are no witnesses to a bill of exchange, as there are to a deed; a bill is more easily altered than a deed; if therefore courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cypher in a bill for 100*l.*, by which the sum might be changed to 1,000*l.* and the holder having failed in attempting to recover the 1,000*l.* might afterwards take his chance of recovering the 100*l.* *as the bill originally stood. But such a proceeding would be intolerable. It was said in the argument that the defendant could not dispute the finding of the jury, that they had found that he accepted the bill, and therefore that the substance of the issue was proved against him. But the meaning of the plea of *non assumpsit* is, not that he did not accept the bill, but that there was no duty binding on him at the time of the plea pleaded. There are many ways by which the obligation of the acceptance might be discharged; for instance, by payment. And it was certainly competent to him to shew, that the duty which arises *primâ facie* from the acceptance of a bill, was discharged in the present case, by the bill itself being vitiated by the alteration which was made.

[*2 H. BL.
144.]

LORD CHIEF BARON MACDONALD :

I see no distinction, as to the point in question, between deeds and bills of exchange: and I entirely concur with my Lord Chief Justice, in thinking there would be more dangerous conse-

quences follow, from permitting alterations to be made on bills, than on deeds.

1793.
MASTER
v.
MILLER.

The other Judges declared themselves of the same opinion.

Judgment affirmed.

GOODRIGHT, ON THE DEMISE OF TOMPSON, v.
SAUL AND OTHERS.

(4 T. R. 356—359.)

1791.
June 30.
[356]

The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access.

[EJECTMENT before Ashhurst, J. at the last assizes at Norwich.

The lessor of the plaintiff traced his descent through a certain Elizabeth Tilyard, who, as it appeared by the evidence, was married to one Simon Kilburn with whom she lived in Norwich for some time without having any children. It was proved that Simon Kilburn left Norwich, and that subsequently the said Elizabeth lived publicly with one Hales, and that during this time she had a son who was always called Joseph Hales. It did not appear where Simon Kilburn was at this time; but the plaintiff contended for the right of J. Hales, as having descended from the marriage of Elizabeth with Simon Kilburn; for that unless non-access of the husband were clearly proved, it must be taken that Joseph the son, whatever his reasons might have been for taking the name of Hales, must, in point of law, be taken to be the son of Kilburn, and could not be bastardised by mere evidence that another person had cohabited with his mother from whom he claimed.] The learned Judge directed the jury to that effect, telling them, that though it was not absolutely necessary to prove the husband out of the realm in order to bastardise the issue, yet it was incumbent on the party insisting upon that fact to prove that the husband could not, by any probability, have had access to his wife at the time; which he conceived had not been shewn in the present instance; whereupon the jury found a verdict for the defendants. To set aside which

[358]

1791.
GOODRIGHT
v.
SAUL.

Wilson obtained a rule *nisi* last term, on the ground that the circumstances given in evidence at the trial were fully sufficient, at this distance of time, to prove the bastardy of Joseph Hales, upon whose right the defence was founded; and that it was not indispensably necessary to prove that by no possibility could the husband have had access to his wife.

[*Le Blanc*, Serjt. shewed cause on this day; but he was interrupted by]

ASHHURST, J. who, after consultation with the rest of the Court, said, that he was of opinion that there ought to be a new trial. He added that he was convinced he had laid too much stress on the necessity of proving non-access, when the husband was within the realm, by witnesses who could prove him constantly resident at a distance from his wife.† That *the husband in this case left the wife, and went to reside at another place, as it was believed in London, and that there was no direct evidence of his access, he observed was very clear; and then there were other circumstances which went strongly to rebut the presumption of access, and to shew that the son was a bastard; among others, a very forcible one occurred, that of the son's having taken a different name from his birth, the name of the person with whom his mother was living at the time, which had been retained by him and his descendants ever since: that was a very strong family recognition of his illegitimacy.

Per CURIAM :

Rule absolute, for a new trial without costs.

† *Hawes v. Draeger* (1883), 23 Ch. D. 173, 52 L. J. Ch. 449.

HOUGHTON *v.* BUTLER AND ANOTHER.

(4 T. R. 364—366.)

1791.
July 9.

[364]

If to an action of trespass for pulling down and carrying away a gate, the defendant plead a right of way, and that the gate being wrongfully erected across the same, he took it down and deposited it in a convenient place for the use of the plaintiff, to which the plaintiff replies a subsequent conversion; proof that the defendant put the gate upon his own premises, from whence the plaintiff might have taken it, if he had pleased, will not sustain the replication.

TRESPASS for breaking down and carrying away an iron gate. Plea, a demise of certain premises from the Company of Salters in the city of London, and a right of way over the *locum in quo*, as appurtenant thereto; and that because the said gate was wrongfully erected across the said way, the defendants broke it down, &c. and removed and carried the same to a convenient distance from the place where it was erected, and deposited the same in a proper and convenient place near to *the said place where the said iron gate had been erected for the use of the plaintiff, &c. Replication, protesting that the defendants did not, after they had broken down the said gate, remove the same to a convenient distance from the place where it had been erected, &c. alleges, that after the breaking down, &c. the said iron gate, in manner and form as the defendants have pleaded, they converted the same to their own use, &c. Rejoinder taking issue thereupon. At the trial at the last sittings at Guildhall, before Lord Kenyon, it appeared that the gate in question having been erected across a way, the right of passing over which was claimed by the defendants, they had taken it down, and laid it on their own side of the premises which joined to the plaintiffs, close by the place where it had been erected, and from whence the plaintiff might have taken it whenever he pleased. No access was proved; but his Lordship inclined to think that the defendants' putting down the gate on their own premises, where the plaintiff had no right to come, was a conversion in point of law; and the plaintiff recovered a verdict: which

[*365]

Bower moved to set aside, on the ground that the putting of

1791.
HOUGHTON
v.
BUTLER.

the gate on the premises of the defendants was not of itself a conversion so as to make them trespassers *ab initio*; for it amounted to a license to the plaintiff to enter and take it away; according to what is said in 2 Roll. 565, pl. 9: That "if a man take my goods and carry them upon his own land, I may justify entering upon his land to take them again, for they came there by his own act." Bro. Abr. "Trespass," pl. 186. The replication put the right of way entirely out of the question, and therefore the plaintiff could only make the defendants trespassers *ab initio*, by proving an excess in the manner of doing the act, or an assumption of right to the gate by them; neither of which appeared.

Erskine now shewed cause. It was not necessary to shew any excess here in the manner of pulling down the gate; but the plaintiff relied in his replication upon an independent conversion afterwards, which was proved by the defendants having carried the gate upon their own premises. That was an assumption of right in them, which made them trespassers.

Bower and *Lambe* in support of the rule, were stopped by

[*366] The COURT, who were clearly of opinion that the plaintiff had not made out his case. The defendants pleaded a right of way, and that, the gate having been wrongfully erected across it, they removed it, and deposited the same in a convenient place for the *use of the plaintiff. The plaintiff did not deny these facts, but replied a subsequent conversion: it was therefore incumbent upon him to prove some trespass which was not covered by the plea, and that he has not done.

Rule absolute.

BERRYMAN, ONE, &C. v. WISE.

(4 T. R. 366—367.)

1791.

June 30.

[366]

In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney by his admission, or by a copy of the roll of attorneys; proof that he acted as such is sufficient.

THIS was an action of slander by an attorney. The declaration stated, that the plaintiff was an attorney of this Court, and having been employed in a particular cause, had received a certain sum of money, which the defendant charged him with swindling, adding a threat, that he would move the Court to have him struck off the roll of attorneys. At the trial at the last York assizes before Thomson, B. the plaintiff proved the words, and his having been employed as an attorney in that and other suits. The defendant's counsel objected, that the plaintiff had not proved the first allegation in the declaration, namely, that he was an attorney of this Court, which could only be proved by his admission, or by a copy of the roll of attorneys: but the objection was over-ruled, and the plaintiff obtained a verdict, the learned Judge reserving the point, with liberty to move to enter a nonsuit.

Wood accordingly renewed his objection in the last term, and obtained a rule to shew cause why a nonsuit should not be set aside: which was now opposed by

Law, who said, that, the substantial allegations being that the plaintiff was an attorney of one of the superior courts of Westminster, it was immaterial whether he were admitted by one Court or the other; and that the charge itself, which the defendant had made, admitted that he was an attorney.

The COURT were of opinion that this was sufficient proof; for the defendant's threat imported that the plaintiff was an attorney. And

BULLER, J. said, that in the case of all peace-officers, justices

1791.
BERRYMAN
v.
WISE.
[*367]

of the peace, constables, &c. it was sufficient to prove that they acted in those characters without producing their appointments, and that even in the case of murder.* The excise and custom-house officers indeed fall under a different consideration: *but even in those cases evidence was admitted both in criminal and civil suits, to shew that the party was a reputed officer prior to the 11 Geo. I. c. 30, s. 32. In actions brought by attornies for their fees, the proof now insisted on has never been required. Neither in actions for tithes is it necessary for the incumbent to prove presentation, institution, and induction; proof that he received the tithes, and acted as the incumbent, is sufficient.

Rule discharged.

1791.
July 12.
[368]

THE KING v. NEWCOMB AND ANOTHER.

(4 T. R. 368—369.)

If a poor rate be not published in the church on the Sunday next after, it is a nullity; and payment under it cannot be enforced, though there be an appeal to the Sessions, which was dismissed.

A RULE having been obtained, calling on the defendants, who were justices for Devon, to shew cause why a mandamus should not issue to compel them to grant a warrant of distress on D. Simpson of Halberton, to levy a poor-rate, cause was now shewn by

[*Dampier*, who said, that as the rate was not published till the third Sunday after it was made, it was a nullity by 17 Geo. II. c. 3, s. 1.

Fanshawe, in support of the rule, contended, that the object of the Act was answered in this case, by publishing it in the church on the third Sunday, which was equally notorious to the inhabitants of the parish as if it had been published on the first Sunday after it was made. But even if it were an objection at

* So determined by all the Judges at the Northampton Spring Assizes in the case of Gordon, who was tried in 1789.

first, it was the ground of an appeal; whereas the rate was appealed against on another ground, and confirmed. And in *Hutchins v. Chambers*,* Lord MANSFIELD said, “A defect in the rate, unappealed from, could not avoid the warrant (of distress).”]

1791.
THE KING
v.
NEWCOMB.

LORD KENYON, Ch. J.:

[369]

There is no doubt but that in a proper case this Court would grant a mandamus to compel the justices to grant a warrant of distress, because without it payment of the rate could not be enforced. But as the mandamus would be no justification to the magistrates, we must take care not to compel them to do an act which may not be warranted by law. Now this application is answered by the Act of Parliament, which requires a particular step to be taken, before the rate can be valid, namely, that public notice shall be given of the rate in the church on the next Sunday after it is allowed; that direction was not pursued in this case, and consequently the rate itself is invalid. Supposing the parish officers were to give notice of the rate at some other public place in the parish, it would not be sufficient, though it might be equally notorious. What is said in *Hutchins v. Chambers** is perfectly right, as applied to the inequality of the rate. But this is a radical defect in the rate itself, which nothing can cure.

BULLER and GROSE, Justices, concurring,

Rule discharged.

* 1 Burr. 587.

K. B. MICHAELMAS TERM.

1791.
Nov. 8.

THE KING *v.* SHEPHERD AND OTHERS.

(4 T. R. 381—382.)

[381]

The Court will not grant a *quo warranto* information to try the validity of an election to the office of churchwarden.

DAYRELL moved for an information in nature of a *quo warranto*, calling on the defendants to shew by what authority they claimed the office of churchwardens of Newark-upon-Trent, on affidavits which impeached their election; and he mentioned an instance in the year 1782, when a similar application had been successful.

LORD KENYON, Ch. J. said, That had it not been for the case cited, he should not have been disposed to grant a rule even to shew cause: for that this was not an usurpation on the rights or prerogatives of the Crown, for which only the old writ of *quo warranto* lay; and that an information in nature of a *quo warranto* could only be granted in such cases; and he observed, that the case in 1782 passed by the consent of both parties, who were equally desirous of having an issue directed to try the validity of the election; for which reason the counsel, who were to have opposed the rule, declined objecting to the novelty of the application. He added, however, that as such a rule had been made in that case, he thought it too much to say that this question should not be discussed on shewing cause against the rule; and on that ground only a rule to shew cause was granted; but on the next day he said,

[382]

The COURT were of opinion that they ought not to listen to the application, for that it was destitute of every legal principle. That the Court refused to grant such an information in *The King v. Dawberry*.* And that in this case even a rule to shew cause

* 2 Stra. 1196; but more fully reported in Bott. pl. 107.

ought not to be granted, lest it should be hereafter drawn into precedent like the case in 1782.

Rule refused.

1791.

THE KING
v.
SHEPHERD.

RORKE v. DAYRELL.

(4 T. R. 402—414.)

1791.
July 8,
Nov. 15.

[402]

If goods be taken in execution on a *fi. fa.* against the king's debtor and before they are sold, an extent come at the king's suit grounded on a bond debt tested after the delivery of the *fi. fa.* to the sheriff, these goods cannot be taken upon the extent.

THIS was an action upon the case, brought by the plaintiff against the defendant as sheriff of the county of Bucks, for a false return of *nulla bona* to a writ of *fieri facias*. On the trial the jury found a verdict for the plaintiff, subject to the opinion of this Court on the following case :

In Hilary Term, 1787, the plaintiff obtained judgment against Michael Clarke for 727*l.* and 63*s.* costs ; on which judgment the plaintiff on the 5th January, 1788, sued out a writ of *fieri facias*, tested 28th November, 1787, and returnable the 12th February, 1788, directed to the defendant, being then sheriff of the said county. The plaintiff delivered the writ to the under-sheriff on the 7th January, 1788, which was indorsed to levy, &c. ; on the next day, the 8th January, the sheriff seized all the goods and chattels of Clarke in his bailiwick, by virtue of that writ ; but before any of them were sold, namely, on the 11th of January, 1788, a writ of extent, tested that day, issued out of the Court of Exchequer, directed to the defendant as sheriff, on a bond to the Crown under the seal of Clarke, dated the 5th of April, 1782, for the sum of 800*l.* payable at a day before the issuing of the said writ of *fieri facias*, and which then remained unpaid. On the 12th January, 1788, notice was given to the defendant's officers, who were in possession of Clarke's goods under the *fieri facias*, of the issuing of the writ of extent ; and on the next day the same writ of extent was delivered to the under-sheriff. The case then stated that another writ of extent issued on the 17th of January,

[403]

1791.
 RORKE
 v.
 DAYRELL.

1788, on another bond of Clarke, &c. which was delivered to the sheriff on the 18th of January. On the 22nd of January, 1788, by two several inquisitions taken under and by virtue of those two several writs of extent, it was found that Clarke then had the several goods and chattels so as aforesaid taken under the *feri facias*, and remaining in the defendant's hands unsold; and the defendant therefore then extended, took, and seized the said goods and chattels into the hands of the king by virtue of the said two several writs of extent. The case also stated three other writs of extent against Clarke; two of them tested the 23rd of January, and the other on the 1st of February, 1788. The case further stated, that on the 1st of February, 1788, a writ of *renditioni exponas*, tested that day, issued out of the Court of Exchequer, directed to the defendant as sheriff, for 300*l.* upon the first writ of extent; and also four other writs of *renditioni exponas*, on the 1st, 4th, 11th, and 21st February, 1788; by virtue of which several writs of *renditioni exponas*, the defendant, as sheriff, on the 23rd of February, 1788, sold all the goods and chattels of Clarke, which he had seized or could seize, for 98*l.* 9*s.* 2*d.*; which sum was insufficient to satisfy the several writs of extent and *renditioni exponas*, *and the sum of 219*l.* 13*s.* which was due to the landlords of the premises on which the goods and chattels were seized for one year's rent. On the 12th of July, 1789, the defendant made the return of *nulla bona* to the plaintiff's writ of *feri facias*.

[*404]

This case was twice argued; the first time on Friday, July 8th, by *Chambre* for the plaintiff, and *Russell* for the defendant; the second time on this day by *Bower* for the plaintiff, and *Erskine* for the defendant.

[The arguments were chiefly directed to the effect of the Statute 33 Hen. VIII. c. 39, s. 74, which enacts, "That if any suit be commenced or taken, or any process be hereafter awarded, for the king, for the recovery of any of the king's debts, then the same suit and process shall be preferred before the suit of any person or persons; and that our said sovereign lord, his heirs and successors, shall have first execution against

any defendant, of and for his said debts, before any other person, so always that the king's said suit be taken and commenced, or process awarded for the said debt at the suit of the king before judgment given for the said other person."

1791.
ROBKE
v.
DAYRELL.

The principal cases referred to are mentioned in the judgments.]

LORD KENYON, Ch. J. :

[410]

This is undoubtedly a case of great importance, because it respects one of the prerogatives of the Crown, existing in the Crown for the public good ; for the prerogatives are not given for the personal advantage of the king, but they are allowed to exist because they are beneficial to the subject. They are therefore to be guarded on account of the public ; they are not to be extended farther than the laws and constitution of the country have allowed them ; but within those bounds they are entitled to every protection. If we entertained any doubt on this subject, I should desire that this case might be turned into a special verdict, in order that it might be carried to the Court of dernier ressort, if the parties should be dissatisfied with our opinion. But as this point has been already determined in the Court of Common Pleas after great deliberation, and as our opinion concurs with that decision, it would be a hardship on the plaintiff to compel him to go through another expensive litigation, before he could reap the fruits of his judgment.

I confess I do not think this a case of difficulty. I believe the judgment in *Uppom v. Sumner* † is warranted by the authorities which are there mentioned as its foundation. In giving my opinion, I therefore refer in general to the authority of that case, and to all the cases there mentioned ; not however without *ex-

[*411]

amining the grounds on which they may be supported. Now where the king and a subject stand in equal degree, there is no doubt but that the king's prerogative must prevail : and, therefore, wherever the property in the goods remains in the king's debtor at the time, and an execution at the suit of the king, and another at the instance of a subject, are sued out, the former will be preferred. On this principle the case of *Rex v. Cotton* ‡ proceeded : that was not the case of an execution, but a distress ;

† Black. 1251, 1294.

‡ Parker, 112.

1791.
 RORKE
 v.
 DAYRELL.

the goods taken were in *custodiâ legis*, as a pledge, to answer the demand of the landlord ; and the property in the goods was not divested out of the tenant. So, the case put at the bar of an execution issuing after a commission of bankrupt, will fall within the same rule. The case supposed was this : The commission of bankrupt issued on the 1st of January ; a *feri facias* on the 1st of February ; an extent on the second ; and no provisional assignment till afterwards : in such a case it is said that the *feri facias* comes too late, but that the extent does not. The answer given to it was not the true one ; it was answered, that the seizure by the messenger bound the goods with respect to the subject, but not with regard to the Crown. In truth the seizure binds nothing : but, as far as respects the subject, the goods of the bankrupt are divested out of him, and vested in his assignees by relation from the time of the act of bankruptcy ; but inasmuch as no relation operates to the prejudice of the Crown till a provisional assignment is made, the king's prerogative attaches on that property, which, with respect to the king, remains the property of the bankrupt. The same principle extends to the other case put at the bar. But neither the one nor the other of those cases breaks in upon the proposition which I stated at first ; That as long as the property of the debtor remains unaltered, and an execution at the suit of a subject and an extent at the king's suit issue against the debtor, the title of the latter must prevail : for the point to be considered in these cases is, In whom is the property ? I have always understood it to be clear and settled (and this question has very frequently occurred in the Exchequer) that, if an extent at the suit of the Crown be tested prior to the time when the subject's execution is delivered to the sheriff, the former shall have the preference. But as by the common law, abridged as it is by the statute of frauds, the property of the debtor's goods is bound by the delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the Crown can attach. Now in this case the sheriff had actually *seized the goods under the plaintiff's writ of execution ; and an execution once begun shall proceed ; it shall not stop on the issuing of a commission of bankrupt against the debtor ; and in this respect I know no distinc-

[*412]

tion between the case of the Crown and that of a subject. On these grounds I am perfectly satisfied with the decision of *Uppom v. Sumner*, and that the plaintiff in this case is entitled to the *postea*.

1791.
ROBKE
v.
DAYRELL.

As to the statute 33 Hen. VIII. c. 39, s. 74, either it did or did not give some new privilege to the Crown: if the counsel for the Crown contend that it did, they must take the word execution as referring to personal chattels, and then the words are against the king, because here there was a judgment by the plaintiff. If it did not introduce some new benefit, then the Crown must be referred to its ancient prerogative, which only extends to the case I stated at first, namely, when the king and subject stand in equal degree, and the property is not altered, there the former shall prevail. With respect to what is supposed to have been said by Lord MANSFIELD in *Cooper v. Chitty* * of Comberbach's having mistaken Lord HOLT's opinion in *Lechmere v. Thoroughgood*,† it is as probable that the report of that observation is mis-stated.

ASHHURST, J. :

The case of *Uppom v. Sumner* certainly underwent a great deal of consideration before it was decided: all the prior authorities were thoroughly examined at that time. Unless, therefore, it could be shewn, that that case proceeded upon wrong principles, it ought to govern the present. But in my mind no substantial objection has been made to that determination. The words of the statute Hen. VIII. are clear and decisive, that the king's suit shall be preferred to that of any other person: "So always that the king's suit be taken or commenced, or process awarded, before judgment given for the said other person or persons." Now this Act of Parliament gave a new prerogative to the king in various instances, which he had not before; by that he is enabled to issue immediate execution in cases where he could not before; for before, he had only a right to such execution when the debt was upon record; and, as this was a new prerogative, the Legislature had a right to restrain him; and they have in

* 1 Burr. 36.

† 3 Mod. 236, & Comb. 123.

1791.
BORKE
 v.
 DAYRELL.

express terms restrained him where the subject's judgment is prior to the inception of the king's execution.

BULLER, J. :

[* 413]

This case arises on the statute 33 Hen. VIII. ; for previous to that Act the Crown could not issue immediate execution on a bond debt ; and therefore perhaps it might be sufficient *to confine the judgment of the Court to this particular case ; though the cases that have already happened on this statute shew that the Act is not to be confined to bond debts only, but that it extends to all debts and executions : it is so stated in express terms by Lord COKE in *Sir T. Cecil's* case.† With regard to the three cases put in argument at the bar, of a commission of bankrupt, a distress, and a statute staple, I lay them entirely out of the case ; because they do not fall within the words of this Act of Parliament, which applies singly to a case where a judgment is given. If this Act of Parliament be restrictive on the Crown, it goes a great way to determine this question ; for if it be, it expressly requires that the king's suit shall be commenced before judgment is given for the subject. Now that was expressly decided in the case in *Hardres*, where the whole Court were of opinion that the statute does abridge the king's prerogative : and there Chief Baron STEEL said, " The subject's title is prior to the king's, and is executed." On this ground I put the question to the counsel in argument : " What effect a judgment obtained by a subject would have, where he lay by till the king's extent were executed ? " I am inclined to think that in such a case the execution by the subject would be postponed : but it is not necessary to decide that point in the present case. It is observable, that it is said in the case in *Hardres*, that the king is only to be preferred to the subject when they both stand in equal degree. So too in 9 Co. 129 b. it is said, *Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet*. So that there appears to be great weight in the words of the LORD CHIEF BARON in *Hardres*, that the execution of the subject must be executed. As to the effect of the statute 33 Hen. VIII. c. 39, it is impossible to have a more direct authority for the restriction on

† 7 Rep. 18, b.

the king's prerogative than that in 7 Rep. 19 b. ; where it is said, That "the Act hath given a benefit and advantage to the king ; 1. In making every bond made to the king, in nature of a statute staple. 2. In giving remedy to the king himself for obligations made to others to his use. 3. To recover costs and damages. 4. In suing of execution for all his debts. 5. In charging the issue in tail, and the heir who hath the land of the gift of his ancestor ; and therefore it was the intent of the act to gratify the subject, that where a new provision was made for the levying of the king's debt in a more speedy and beneficial manner than the king had before, the subject *also should have some new benefit which he had not before." Now that new benefit was to give him a preference in cases where his judgment was obtained before the extent of the king issued. This is the fullest exposition of the statute Hen. VIII. In this case, therefore, I am clearly of opinion that the plaintiff is entitled to judgment.

1791.
ROBKE
v.
DAYRELL.

[*414]

GROSE, J. :

The simple question is this, Whether the king's right of issuing an extent upon a bond supersedes a prior judgment of a subject ? If the Crown have such a right, it must arise on the statute 33 Hen. VIII., Gilb. Hist. Exch. 165. Now the words of this clause in the Act are extremely pointed ; to shew, first, What the king's prerogative was before : secondly, How far the prerogative was intended to be assisted in these cases ; and how far to be limited. But it is said that "execution" in this Act was intended only to affect lands : but there is no reason why it should be so confined ; it must mean every kind of execution to which the king was entitled before the passing of this Act, otherwise the king would be bound in cases where he had a prerogative before. Thus this case stands on the words of this statute. The authorities also are decisive. First, The case in *Hardres* is very pointed ; and there it was not even hinted that execution in this Act ought to be confined to an execution against land. Then came the case of *R. v. Dickenson*.† And Lord Chief Baron COMYNS ‡ drew this conclusion from the cases, That "if execution be upon a judgment against the king's debtor, and before a

† Park. 262.

‡ 2 Com. Dig. 538, 648 (G. 8.)

1791.
 RORKE
 v.
 DAYRELL.

venditioni exponas an extent comes at the king's suit, those goods cannot be taken upon the extent." Therefore, as well on the decisions as on the construction of the statute 33 Hen. VIII. the plaintiff is entitled to recover.

Postea to the plaintiff.

1791.
 Nov. 17.

COBDEN v. KENDRICK.

(4 T. R. 431—432.)

An attorney is not restrained by any rule of law from giving evidence of a conversation between him and his client touching the justice of his suit after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for conducting his cause.

[*432] An action had been brought some time before by the present defendant, as indorsee of a promissory note for 150*l.* against *the present plaintiff as the maker; in which cause interlocutory judgment had been signed, and a writ of inquiry executed; after which the cause was compromised by Cobden's paying part, and giving a warrant of attorney to confess judgment for the residue of the 150*l.*; † and in the interval between the time when the warrant of attorney was given and the time when the money became due, according to the defeasance thereof, Kendrick told Allen, who was his attorney in that suit, that he was glad it was settled, for that he had only given 10*l.* in cash, and his promissory note for it; and that he knew it was a lottery transaction. This action was now brought to recover back the money so paid, on the ground of want of consideration; and in proof that that was known to Kendrick at the time he took the note. Allen was called as a witness at the trial, to speak to the conversation above-mentioned, and he was admitted by Lord KENYON after argument upon his incompetency; and a verdict passed for the plaintiff.

† Another objection was taken at the trial, that this action was in effect to put the same sum in litigation a second time which had been recovered in the former action by *Kendrick v.*

Cobden; but Lord KENYON overruled it, on the ground that the money had been paid under a compromise, and not under the judgment of a Court.

Law now renewed his objection, and moved for a new trial, on the ground that Allen had been improperly permitted to give evidence of the conversation between him and the defendant, his client; contending that Allen fell within the rule of law which prohibited an attorney from betraying the confidence placed in him by his client; which confidence lasts so long as any proceedings may be had in the cause. Here the proceedings were not completely at an end when the conversation was held. The party might still have proceeded to judgment in the original suit; and the attorney had still his lien for the costs: so that the relation of attorney and client in respect of the parties to the original suit was not determined at the time when the communication was made by Kendrick to Allen and his attorney.

1791.
COBDEN
v.
KENDRICK.

PER CURIAM:

The difference is, Whether the communication were made by the client to his attorney in confidence as instructions for conducting his cause, or a mere *gratis dictum*. The former was not the case here: on the contrary, the purpose in view had been already obtained; and what was said by the client was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

Rule refused.

YEA, BART. v. LETHBRIDGE.

(4 T. R. 433—435.)

1791.
Nov. 17.
[433]

In an action against the sheriff for taking insufficient pledges in replevin, the plaintiff cannot recover damages beyond the value of the distress.

THIS was an action on the case, against the defendant, sheriff of Somersetshire, for taking insufficient pledges in replevin. The question now came before the Court as to the amount of damages.

[After argument on behalf of the defendant, the counsel for the plaintiff were stopped by the Court.]

1791.

LORD KENYON, Ch. J. :

YEA, BART.

v.
LETH-
BRIDGE.

[435]

In order to see to what amount the sheriff is answerable, it is necessary to inquire what would have been the consequence if he had taken sufficient pledges. Now the duty of the sheriff, as prescribed by the Act of Parliament, is to take a bond for prosecuting the suit, and for a return of the goods distrained, if a return shall be awarded.* Then, if he had taken such a bond, how would it have been satisfied? By returning the goods taken. Then the value of those goods seems to be the true measure of damages to be given in this action. In the case cited from Blackst. Rep.† the only question was, Who should be answerable? Nothing is there said respecting the *quantum* of damages; and it must have been by consent, otherwise the Court were assuming the province of a jury.

ASHHURST, J. and BULLER, J. assented.

GROSE, J. :

The duty of the sheriff is accurately pointed out by the stat. of Westminster 2,‡ which requires, “That sheriffs shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return awarded; and if any take pledges otherwise, he shall answer for the price of the beasts.” And the 11 Geo. II. does not enlarge the sheriff’s responsibility in this respect.

Rule absolute.

Note.—The responsibility of the sheriff in regard to replevins was abolished by 19 & 20 Vict. c. 108, s. 63, now replaced by 51 & 52 Vict. c. 43, s. 134; but the case may still be useful as an authority upon the nature and effect of a replevin bond. In a subsequent case in the Common Pleas (*Concanen v. Lethbridge*, 2 H. Bl. 36), that Court held that the plaintiff might recover damages beyond the penalty of the bond. But in the case of

* 11 Geo. II. c. 19.

1220.

† *Richards v. Acton*, 2 Bl. Rep.

‡ 13 Ed. I. st. I, c. 2, s. 3.

Evans v. Brander, 2 H. Bl. 547, the Court of Common Pleas, being then differently constituted, accepted the principle as laid down in the above case. In *Hunt v. Bond* (1834), 2 Dowl. 558, the Court of King's Bench held that the sureties in the replevin bond were not liable for more than the value of the goods seized and double costs, although the penalty in the bond exceeded that amount.—R. C.

1791.
YEA, BART.
v.
LETH-
BRIDGE.

THE KING *v.* E. EDWARDS.

(4 T. R. 440.)

1791.
Nov. 17.
[440]

A witness may be asked whether he has not been in the pillory for perjury.

ON an application to bail the prisoner, who was charged with grand larceny, one of the bail was asked whether he had not stood in the pillory for perjury? This question was objected to, as tending to criminate him; but

The COURT over-ruled the objection; saying, there was no impropriety in the question, as the answer could not subject him to any punishment; and the bail admitting the fact, he was of course rejected.

BEACHCROFT AND OTHERS *v.* BROOME.

(4 T. R. 441—442.)

1791.
Nov. 18.
[441]

Under a devise to A. and his heirs, but if he die without settling or disposing of the same, or without issue, then over, A. may settle the estate in his lifetime, and defeat the limitation over.

THIS was a case sent from the Court of Chancery for the opinion of this Court. M. Wymondsold, by will, dated 12th June, 1748, devised his estate in Berkshire (except what were situate at Coxhill and Lambourne, and the tithes of Grove) to his son Francis Wymondsold and his heirs, &c.; and the rest of his estates (of which the premises in question are part) to his son Charles and his heirs, &c.; and if either Francis or Charles should die without having settled, or otherwise disposed of, the

1791.
BEACHCROFT
v.
BROOME.

estates so devised, or without leaving issue of his or their respective body or bodies lawfully begotten; or having such issue, such issue should die before his or their age or ages of twenty-one, and without leaving lawful issue, he willed that the premises so given to such of his sons Francis and Charles so dying, should go, and he gave the same unto the survivor of them, his heirs, &c. for ever; and if the survivor should die without having settled or otherwise disposed thereof, or of the estates thereby originally devised to him, or without leaving lawful issue of his body, or, having such issue, such issue should die under twenty-one without issue, and his son William should then be dead without issue, then he gave such of the said devised premises as should not have been settled or disposed of as aforesaid, unto the right heirs of M. Green, then deceased, in fee. Matthew Wymondsold died soon afterwards; and Francis Wymondsold died in 1759 without issue. [Charles Wymondsold conveyed the premises in question to J. Shephard, through whom the plaintiffs' title was deduced, in fee; and subsequently died without issue. The defendant, who had contracted with the plaintiffs for the purchase of the estate, refused to complete, contending that they had not a good title. The question was referred by the Court of Chancery to this Court.]

[442]

Russell, for the plaintiff, said, That it had been contended in the Court of Chancery that, as the estate in question was given over if Charles, the son, died without having disposed of it, or without leaving issue in the disjunctive, it was vested in Green's heir, because both those events had not happened: but he insisted that that question did not arise here, because the estate was first given to Charles in fee, and was only to be defeated by his not disposing of it and dying without issue, which necessarily implied the power of disposing of it in his lifetime: and, as he actually conveyed it in 1759, the devise over to Green's heir never took effect. [But even if the former question could be gone into, the word "or" might be construed "and," in order to effectuate the manifest intention of the devisor. Pollexf. 645; 2 Str. 1175; 3 Atk. 390; and *Wright v. Kemp* (3 T. R. 170, R. R. vol. i., p. 748)].

Chambre was to have argued on the other side ; but candidly confessed, in answer to a question from the Bench, that he had no hopes of success.

1791.
BEACHCROFT
v.
BROOME.

LORD KENYON, Ch. J. :

It is impossible to raise any serious doubt in this case. I take it for granted that this case was sent from the Court of Chancery as a matter of course, on its being suggested there that a question would arise on the will, fit to be determined in a Court of Law. It seemed to me as if the parties had considered that a question would be made, Whether this were or were not an estate-tail? If it had turned on that question, I should have thought it extremely clear that, on failure of the first limitation, the second might have taken effect as an executory devise. In truth, the real question is, What was the intention of the devisor? and if that can be collected from the words of the will, it must be carried into execution, provided it be not contrary to the rules of law. Now he has said in express terms, "I give one estate to one son and his heirs, and another to another son and his heirs; and if either of them die without having settled or disposed of the estates, or without issue, then that it should go over." But the son Charles has settled and disposed of the estate given to him, and there is no doubt but that the devisor intended that he should have the power so to do. And

The Court afterwards certified accordingly.

BRADSHAW v. LAWSON.

(4 T. R. 443—447.)

1791.
Nov. 18.
[443]

If the lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services: for the tenant, by reason of the statute *Quia emptores*, must then hold of the superior lord.

THIS was an action of debt, to recover 2s. 6d.; in which sum the defendant had been amerced for not attending, in respect of a customary estate, a court baron held for the manor of Halton,

1791.
BRADSHAW
v.
LAWSON.

of which the plaintiff was lord. At the trial several objections were taken by the defendant's counsel, when it was agreed that a case should be reserved for this Court; and if they should be of opinion that either of the objections were well founded, a non-suit should be entered. The special case, as far as respects the principal question, stated these facts: That the plaintiff is seised of the manor of Halton for life; that the defendant is seised of fourteen acres of land, parcel of the estate mentioned in the deeds after stated. Till the reign of Queen Elizabeth all the lands within the manor (except the lord's demesnes) were of customary tenure of inheritance, passing by customary deeds and admission of the lord. Several of those estates remain customary, unaltered in point of tenure. The defendant's estate was, until the 2nd October, 18 Jac. I., parcel of one of those customary estates; when by an indenture of feoffment, with livery of seisin indorsed thereon, the then lord of the manor, in consideration of 80*l.* granted, aliened, enfeoffed, and confirmed it to C. Barwicke and his heirs and assigns in fee-farm, reserving the yearly rent of 1*l.* 4*s.* 11*d.* (there stated to be the ancient yearly rent) for all manner of other rents, suits, services, exactions, and demands whatsoever. The case then set forth another deed of the 14th May, 1 Car. I.; by which, after reciting that upon the agreement of the above conveyance, and as part of the consideration given or reserved upon the sale of the estate, it was agreed between the parties that Barwicke, and all other persons who should hold his estate, should grind their corn at the lord's mill, and should do suit and service at the lord's court baron for the above estate, E. Barwicke (the son of the above C. Barwicke) covenanted for himself and his heirs, that they would at all times be suitors, and do suit and service, and appear in person at all the courts baron, &c. as formerly; and should be subject to pay such fines and amerciaments as should be assessed or found due by the homage or jury within the manor: and this deed also contained a covenant by E. Barwicke, that if he and his heirs and assigns, *owners of this estate, should make default in doing such suit and service, &c. they should pay 2*s.* 6*d.* for every such default. The case further stated, that several other of the customary estates in the manor

have been since enfranchised in like manner. The style of the Courts holden in the manor, has always been thus : “ The court-baron of A. B. esq. held thereon, &c. before,” &c. As well the customary tenants as those who have been enfranchised, have been accustomed to attend at such Court ; and the juries have been composed indifferently of such customary tenants and owners of such enfranchised estates, who have joined in making amerciaments upon all such owners, as well of customary as enfranchised estates, as have made default and neglected to appear after notice : but it does not appear by the rolls of the manor that such amerciaments have ever been affeered. The owners of the enfranchised estates making such defaults have been usually, but not always, amerced in the sum of 2*s.* 6*d.* each ; and the owners of the customary estates 3*s.* 4*d.* [A Court was held within the manor in June, 1788 (after giving the usual notice) before the plaintiff and his steward ; at which the defendant who held a parcel of land under a title deduced from the above-mentioned deeds of 18 Jas. I. and 1 Charles I. was amerced 2*s.* 6*d.* by the jury for not appearing to perform suit and service.]

1791.
BRADSHAW
v.
LAWSON.

Fitzgerald for the plaintiff, in answer to the first and general objection that the defendant was not bound to do suit and service to the Court, said, That though by the first deed, 2 Jac. I. taken by itself, the defendant's estate might be said to have been enfranchised, yet, by the second, which is to be considered not only as part of the same transaction, but as a part of and engrafted on the first deed, suit and service were expressly reserved. Both these deeds ought to be considered as forming one conveyance ; especially as the latter recites that it was part of the first agreement that the suit and service should be reserved. In Co. Litt. 222. b. it is said, “ If an agreement be made between two, that the one shall enfeof the other upon condition in surety of the payment of certain money ; and after the livery is made to him and his heirs generally, the estate is holden by some to be upon condition, inasmuch as the intent of the parties was not changed at any time, but continued at the time of the livery.” But even upon the first deed alone, suit

[445]

1791.
BRADSHAW
v.
LAWSON.

and service were reserved in law. By the reservation of the fee-farm rent the lord was entitled to fealty; and a seisin of fealty is a seisin of all other services. Lit. sect. 130, 131; 4 Rep. 8.

LORD KENYON, Ch. J. (stopping *Chambre, contra*):

[*446]

Notwithstanding all the industry that has been exerted on this occasion, *I cannot entertain a doubt on the principal question, which was settled about five centuries ago by a positive Act of Parliament, the statute of *Quia emptores*.† And the objection to the plaintiff's claim, which arises on this statute, decides the merits of the cause, and renders it unnecessary to consider the other points that were made by the plaintiff's counsel, which perhaps on examination would be found equally destitute of all legal principles. It is stated, as the foundation of the plaintiff's demand, that the relation between these parties is that of lord and tenant; as long as that continued, the services to be rendered by the latter were to be regulated by the custom of the manor; and among others was that of attending the lord's Court. Now it is stated in the case, that the lord of this manor in the reign of James the First, by competent deeds of conveyance conveyed the property, of which the defendant is now seised, to the defendant's ancestor, then a customary tenant of the manor. But it has been said that the old services were reserved by the reservation of the fee-farm rent: but if the relation of lord and tenant absolutely ceased to exist, that rent can no longer be considered as rent-service, but a rent to be recovered according to the contract between the parties. After the statute of *Quia emptores* the lord could not by any deed reserve the old services, when he conveyed away the estate in respect of which those services were due; for the tenant must hold of the superior lord. By the conveyance the estate was no longer parcel of the manor, nor held of the manor; neither was the defendant's ancestor any longer a tenant of the manor. Therefore on that point, on which all the plaintiff's claim is founded, I am extremely clear that the defendant was not bound

† 18 Ed. I. st. 1.

to attend the plaintiff's court baron as a tenant of the manor.
 * * * Without going through the other points that were
 argued, I am of opinion that the very foundation of the plain-
 tiff's claim totally fails; and that a judgment of nonsuit should
 be entered.

1791.
 BRADSHAW
 v.
 LAWSON.
 [447]

ASHHURST, BULLER, and GROSE, Justices, assenting,

Judgment of nonsuit.

THE KING v. T. SAINSBURY, Esq., AND ANOTHER.
 (4 T. R. 451—457.)

1791.
 Nov. 19.

Where two sets of magistrates have a concurrent jurisdiction, and one
 appoints a meeting to grant ale licences, their jurisdiction attaches, so
 as to exclude the others appointing a subsequent meeting; but (although
 they may all meet together on the first day) if, after such appointment,
 the other set of magistrates meet on a subsequent day and grant other
 licences, their proceeding is illegal, and the subject of an indictment.

[451]

THE indictment stated, That on the 4th September in the 27th
 year of the present reign, at the borough of Southwark, in the
 county of Surrey, a general meeting of the justices, &c. of the
 county of Surrey, acting in and for the division of the town and
 borough of Southwark, was duly held for the purpose of licensing
 persons to keep common inns and alehouses within the said
 division, according to the form of the statute, &c. That one J.
 Hedger then and there requested the said justices at such meet-
 ing to grant him a licence, &c. in the parish of St. George in the
 Borough; that the said justices did not then grant him the
 licence, but postponed the further consideration of the question
 until the 11th of September, to which day they adjourned that
 meeting; that at the adjourned meeting the said justices finally
 refused to grant their licence to Hedger; that the defendants,
 two justices of the peace for the town and borough of Southwark,
 well knowing the premises, and having notice of the said deter-
 mination, and that the licence had been refused, &c. not having
 any regard for the laws of this realm, but intending to increase
 the number of common inns and ale-houses in the said town and

1791.
THE KING
v.
SAINSBURY.

borough, in defiance of legal magistracy and good order and government, afterwards, on the 18th of September in the same year, with force and arms, at Southwark aforesaid, unlawfully and wrongfully met together as justices of the peace for the town and borough of Southwark, for the purpose of granting licences to persons living in the said town and borough, &c. and then and there unlawfully and wrongfully granted their licence to the said J. Hedger to keep a common alehouse in the same house for which he had so requested a licence to be granted to him by the justices for the county of Surrey, acting in this division, &c.; in breach and violation of the defendants' duty as justices, in contempt of the king and his laws, against the form of the statute, &c. and against the peace, &c.

The defendants pleaded the general issue; and on the trial the jury found a special verdict, in substance as follows:

[452]

After stating that the corporation of London were a corporation by prescription, it set forth three several charters; 1 Ed. III., 23 Hen. VI., and 4 Ed. VI.; by which (*inter alia*) the mayor, recorder and such of the aldermen of the city as have passed the chair, are appointed justices of the peace for the town and borough of Southwark: but neither of those charters contained a *non-intromittent* clause as to the justices for the county of Surrey. That the mayor and aldermen of the city who have borne the office of mayor, and the recorder for the time being, have been used and accustomed to hold sessions of the peace within and for the town and borough of Southwark four times in every year; and for forty years and upwards have licensed persons to keep alehouses in the said town and borough; but they have not been accustomed to act as justices of the peace there in any other manner. That the town and borough of Southwark is within the county of Surrey, and the justices appointed for the county have been accustomed to act in Southwark, and to license persons to keep alehouses therein. That the general quarter sessions have been usually holden once in every year within the borough; and the three other sessions in other different places in the county. The verdict then stated that A. B. C. D. &c. (the justices for the county mentioned in the indictment) were on the 4th and 11th of September, 1787, justices of

the county of Surrey, and acting in and for that division in which Southwark lies. That certain justices of the county, acting in and for the division in which Southwark lies, on the 15th of August, 1787, issued their warrant under their hands and seals, and thereby appointed a general meeting of the justices of the county, acting in and for the said division to be holden on the 4th September then next following, at a certain place therein mentioned, for the purpose of licensing persons to keep common inns and alehouses within the said division; and that in pursuance of such warrant the said general meeting in the said indictment mentioned, was held on the said 4th of September by and before A. B. C. D. &c. That at that meeting J. Hedger applied to those justices for a licence, who did not grant it, but postponed the further consideration of it till the 11th of September; to which day that meeting was adjourned. That at the adjourned meeting held, &c. those justices refused to grant a licence to J. Hedger. That on the 25th of August, 1787, the defendants then being, the mayor and alderman of the city of London who had passed the chair, issued their warrant for holding a general meeting of the *justices in and for the town and borough of Southwark on the 14th of September then next, at a certain place within the borough, for the purpose of granting licences, &c.; in pursuance of which a meeting was held by the defendants on that day, which was adjourned to the 18th of September, when they granted a licence to Hedger. That at this adjourned meeting, and before the defendants licensed Hedger, they had notice of the general meeting held by the justices of the county, and of their having refused to grant a licence to Hedger.

1791.

THE KING
v.
SAINSBURY.

[*453]

Shepherd on the part of the prosecution, contended, that under 26 Geo. II. c. 31, s. 4, there could be but one legal meeting of the justices, unless by adjournment, in any particular division for the purpose of granting licences; and therefore, unless the defendants could establish an exclusive jurisdiction in the city of London to that purpose, and shew that the county magistrates had no right to convene any meeting at all, they must fail, inasmuch as the county magistrates had first given

1791.
THE KING
v.
SAINSBURY.

[*454]

notice of the meeting to be held, and the subsequent meeting of the city magistrates was not an adjournment of the other. * * * The Court have already decided in the *King v. Holland and Forster*,† and the *King v. Filewood*,‡ that the subsequent granting of a licence by magistrates, after the general meeting had refused one, was the subject-matter of a criminal information: and therefore as the act is illegal, an indictment necessarily lies, though no corrupt motive be imputed in the present case. Now it cannot be disputed that the county-magistrates had a right to convene the meeting for the purpose of granting licences: their commission extends over the whole county; *and though the defendants may also have jurisdiction over the borough of Southwark by charter, yet as their charter contains no *non-intromittent* clause, it is clear that the jurisdiction of the county justices is not excluded. *Blankley v. Winstanley*.§ * * *

Garrow, on the part of the city of London, declined entering into the general question of jurisdiction, alleging as a reason some particular objections to the manner in which the special verdict had been drawn up out of Court, and relied on several formal objections. * * *

[455]

LORD KENYON, Ch. J.:

[*456]

Considering who are the litigating parties upon this record, it is impossible to suppose that the prosecution was instituted for any other purpose than that of settling the limits of this jurisdiction. And therefore, without giving any opinion upon the formal objections which have been raised, and which may be argued again if the parties desire it, we ought to take the first opportunity of settling the real question in the case, which is, In whom is vested the jurisdiction of granting ale licences, and of doing other magisterial acts within *this district?—and that point, though it is of great importance to the public, is involved in no difficulty whatever. That the King may grant a commission of the peace for a county, and that the jurisdiction of such

† 1 T. R. 692; R. R. vol. i. p. 362.

‡ Ibid.

§ 3 T. R. 279; R. R. vol. i., p. 704.

justices may pervade the whole county, cannot be doubted. Neither can it be disputed that he may grant commissions of the peace for any particular district in the county, and that that subdivision may have justices of its own, exclusive of the jurisdiction of the justices of the county at large: but the latter can only be effected by a *non-intromittent* clause, prohibiting the county justices from interfering in that district. This doctrine was fully recognized in *Talbot v. Hubble*, 2 Str. 1154; from a manuscript note of which, it appears that it was there taken as a *datum* that the justices of the county would be excluded if there were a *non-intromittent* clause in the charter granted to the smaller district, but not otherwise. In one of the charters granted to the city of London, there is an express power constituting the mayor and certain of the aldermen justices of the borough of Southwark; they are therefore charter justices of that district; and that jurisdiction has never (I believe) been doubted. But another question has arisen, and which is proper should be settled, Whether it be legal (for whether it be decent or decorous no person can doubt) for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction? It is of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. The facts in this case are shortly these:—Some of the justices for the county of Surrey, having before them the statute of 26 Geo. II. and knowing that the licences ought to be granted on a certain day and time, appointed a day, the 4th of September, for licensing ale-houses in this division; on which day they accordingly held their meeting; and certain of the magistrates of the city of London, who in general are competent to this purpose, appointed another meeting on a subsequent day. But the jurisdiction of the justices who had appointed the first meeting, had attached before this time; not indeed so as to exclude the city justices from acting at the first meeting, for they might all have acted together; but it excluded the city justices of their jurisdiction to act on the subsequent day. On the general question therefore I am clearly of opinion that the Surrey justices and the magistrates for the city have a co-

1791.

THE KING
v.
SAINSBURY.

1791.
THE KING
v.
SAINSBURY.
[*457]

ordinate jurisdiction within this district; and that *the meeting of the city justices in this case was illegal, the jurisdiction of the other magistrates having first attached. But, as to the questions of form, if the city of London are serious in relying on them, I shall require further time before I deliver my opinion upon them.

ASHHURST, J. :

There being no words of exclusion in the city charters, it follows as a consequence that the justices of the county have a concurrent jurisdiction in the borough of Southwark: if so, it also follows that the jurisdiction of holding the meeting directed by the 26 Geo. II. attached in those magistrates who first gave notice of the meeting; and it was a breach of the law in the other magistrates to attempt to wrest this jurisdiction out of their hands; for what the law says shall not be done, it becomes illegal to do, and is therefore the subject-matter of an indictment, without the addition of any corrupt motives. And though the want of corruption may be an answer to an application for an information, which is made to the extraordinary jurisdiction of the Court, yet it is no answer to an indictment, where the judges are bound by the strict rule of law.

BULLER, J. declared himself of the same opinion; and he and Mr. Justice ASHHURST seemed to incline against the formal objections.

GROSE, J. declined giving any opinion, not being in Court when the case was argued.

The RECORDER OF LONDON then said, That, as the Court had delivered their opinion upon the principal question, the City would not trouble them with any further argument upon the objections of form; on which

The COURT gave

Judgment for the Crown.

THE KING *v.* HOLLAND.

(4 T. R. 457—459.)

1791.
Nov. 19

[457]

An information filed by the Attorney-General against an East Indian delinquent under 24 Geo. III. c. 25, as amended by 26 Geo. III. c. 57, to which the defendant demurred, may be amended in B. R. upon the motion of the Attorney-General.

An information had been filed by the *Attorney-General* against the defendant, for offences committed in India; the trial for which is particularly provided for by the 24 Geo. III. c. 25, amended by 26 Geo. III. c. 57. The defendant demurred to this information; and the *Attorney-General* obtained a rule to shew cause why the information should not be amended in certain particulars.

Erskine, *Bower*, and *Anstruther*, shewed cause against the rule; contending that the *Attorney-General* ought to be driven to file a new information; and that no power was given by the Act to enable the Court of King's Bench, after a demurrer, to amend the information. They relied chiefly on the 22nd and 24th sections of the latter statute: by the 1st of which the defendant is precluded from taking any advantage of a defect in the proceedings in arrest of judgment; and the latter only provides for the case where his demurrer is over-ruled in the King's Bench. * * *

[458]

The *Attorney-General*, *contra*, was stopped by the Court.

LORD KENYON, Ch. J.:

If amendment after amendment were to be applied for to harass the defendant, perhaps the Court would refuse to lend their aid any longer: but this is an application in the ordinary course of justice. The Act of Parliament on which these proceedings are founded is indeed introductory of something novel in the progress of them; but, as far as this information has already proceeded, there is nothing to distinguish it from other informations. At present, the information has gone on in the common course; and therefore we may fairly try the propriety of this

1791.
THE KING
v.
HOLLAND.

[*459]

application by the common rules of practice on the like proceedings. Now amendments upon informations are so much a matter of course, that they are even made on an application to the judges at chambers. With respect to the amendments proposed altering the nature of the undertaking of the bail, *the same objection would equally apply to amendments in all other informations. But it is said, that they ought not to be allowed here; because the Legislature, having precluded the defendant from moving in arrest of judgment for any defect in the proceedings, and having only provided for the case of his demurrer being over-ruled, could not have intended that his demurrer should be inconclusive, if it prevailed. We cannot here examine the hardship of such a provision: but let it always be remembered, that the defendant has also an extraordinary indulgence granted to him; for he is not concluded by a bad demurrer, but may afterwards be tried on the merits. But at all events it is right that the nature of the offence should be made to appear clearly and legally upon the record to the judges who are to try it; and I am clearly of opinion that this amendment is absolutely of course.

Per CURIAM :

Rule absolute.†

† The 23rd sect. of the 26th Geo. III. (c. 57) provides expressly, “that nothing in that or the recited act contained shall extend or be construed to extend to deprive the prosecutor of such information, or the defendant thereto of any right, liberty, benefit, or advantage, to which by the law of the land, or the rules of practice of the Court of King’s Bench, such prosecutor or defendant is or might have

been entitled upon any other information of a like nature depending in the said Court of King’s Bench before issue in fact joined therein; nor to prevent or restrict the said Court of King’s Bench from exercising any such power or authority as would or might have been legally exercised by it in the matter of any such information before issue in fact joined therein,” &c.

JONES, ON THE DEMISE OF GRIFFITHS, v. MARSH.

(4 T. R. 464—466.)

1791.
Nov. 21.
[464]

Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice.

On the trial of this ejectment before Heath, J. at the last Shrewsbury assizes, it was admitted that the defendant was tenant from year to year to the lessor of the plaintiff; and the only question was, Whether the defendant had been served with due notice to quit? It appeared that the notice had been served on the defendant's maid-servant at his house, which was not situated upon the demised premises, and the contents explained to her at the time; but there was no evidence that it ever came to the defendant's hands, except as above. As this notice was to determine an interest in lands, it was objected that it was not sufficient; and the learned judge nonsuited the plaintiff, giving him leave to move to set aside the nonsuit, and to enter a verdict for him if this Court should be of opinion that the notice was sufficient.

A rule *nisi* having been obtained for that purpose by *Bower*,

Plumer shewed cause, contending that as the plaintiff was not entitled to turn the tenant out of possession without giving him six months' previous notice, the *onus probandi* necessarily lay upon the former; and that it was not reasonable to call upon the tenant to prove a negative, merely upon evidence that some other person had been served with it at his house; especially as in this case the service was at a house off the premises. * * *

[465]

Bower, *contra*, was stopped by the Court.

LORD KENYON, Ch. J. :

This is different from the cases of personal process: but even in the case alluded to of service on the wife, I do not know that it is confined to a service on her on the premises; I believe that

1791.
 JONES
 v.
 MARSH.

if it be served on her in the house, it is sufficient. But in every case of the service of a notice, leaving it at the dwelling-house of the party has always been deemed sufficient. So wherever the Legislature has enacted, that before a party shall be affected by any act, notice shall be given to him, and leaving that notice at his house is sufficient. So also in the case of an attorney's bill, or notice of a declaration being filed : and indeed in some instances of process, leaving it at the house is sufficient ; as a subpoena out of the Court of Chancery, or a *quo minus* out of the Exchequer. In general, the difference is between process to bring the party into contempt, and a notice of this kind ; the former of which only need be personally served on him.

BULLER, J. :

[*466]

Ex concessis personal service is not necessary in all cases. Then what were the facts of this case ? It was proved that this notice was delivered to the tenant's servant at the dwelling-house of the tenant, and its contents were explained at the time ; and that servant who was in the power of the defendant was not called to prove that she did not communicate the *notice to her master ; this was ample evidence, on which the jury would have presumed that the notice reached the tenant.

Rule absolute.

1791.
 Nov. 21.
 [466]

CLUGAS v. PENALUNA.

(4 T. R. 466—468.)

An inhabitant of Guernsey cannot recover in the Courts of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into England, and gave him assistance for that purpose.

A RULE *nisi* having been granted for setting aside a nonsuit in this case,

BULLER, J. before whom the cause was tried at the last Cornwall assizes, reported, that it was an action upon several bills of exchange, which had been given for goods bought by the defendant in Guernsey. The defendant rested his defence on the ground of its being a smuggling transaction ; in proof of which

he read in evidence several letters, dated Guernsey, from the plaintiff, in which he informed the defendant of his having shipped so many ankers* of brandy and gin, which he had delivered to Captain Johns according to his orders, and that others were to be sent by the next trip. From the prices in the invoices accompanying the letters, it appeared that the ankers in which the spirits were shipped contained about seven gallons each, and those prices tallied exactly with the sums for which the bills in question were given. Upon this evidence BULLER, J. informed the plaintiff's counsel that he should leave it to the jury to find for the defendant, conceiving that this case fell within the principle of that of *Biggs v. Lawrence*†; on which they agreed to be nonsuited, reserving the question for the opinion of this Court, Whether the plaintiff was precluded from recovering under these circumstances?

1791.
CLUGAS
v.
PENALUNA.

[*Lawrence*, Serjt. and *Jekyll*, for the plaintiff, argued that the case came within the decision of *Holman v. Johnson* (Cowp. 341).]

[467]

Gibbs, *contra*, was stopped by the Court.

LORD KENYON, Ch. J.:

The only question is, Whether there was sufficient evidence to go to the jury of this being a smuggling transaction? It was said, in argument, that this was not an immoral transaction: but, though the mere selling of the liquors might not be so, yet if they were sold there by a subject of this country with a view to evade the laws of this country, it savours strongly of immorality. Now it is impossible, considering the whole of this case, not to see that such were the views of the plaintiff; and if so, it taints the whole transaction: and he cannot recover on the bills which were given for securing the price of these goods: for though perhaps it might not be against the laws of Guernsey, payment cannot be enforced by judicial process in any Court in this country.

* An anker contains 64 wine quarts: but the 19 Geo. III. c. 69, s. 1, prohibits the importation of foreign spirits in vessels containing less than 60 gallons.
† R. B. vol. i. p. 740.

1791.

ASHHURST, J. :

CLUGAS
v.
PENALUNA.

Though perhaps this was a legal contract at Guernsey, which may be enforced in the Courts of law there, the question here is, Whether the Courts of justice in this country ought to give effect to a smuggling transaction contrary to the laws of the country? I think they ought not.

BULLER, J. :

[*468]

If goods be *bonâ fide* sold in Guernsey, and delivered there in the fair course of trade, the seller may recover *the price of them here, though they be afterwards smuggled into this country. But here the plaintiff himself was assisting in the act of smuggling, by the means of packing the goods; for the spirits were delivered in ankers, which are used for the purpose of smuggling; and if he take part in the transaction, it taints the whole of it. And this distinguishes the case of *Holman v. Johnson* from the present.

GROSE, J. :

If a Guernsey man collude with a person living here to defeat the laws of this country, he shall not call in aid the laws of this country.

Lord KENYON also observed, that this was distinguishable from *Holman v. Johnson* in another respect; that the plaintiff there was not a subject of this country, but here he is.

Rule discharged.

1791.

Nov. 22.

IRVING v. WILSON AND ANOTHER.

(4 T. R. 485—487.)

[485]

If a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in action for money had and received. In such an action a month's notice need not be given under the 23 Geo. III. c. 70, s. 30.

THIS was an action on the case, to recover the sum of 2*l.* 11*s.* as money had and received by the defendants to the plaintiff's

use. At the trial at the last Carlisle assizes before Thomson, Baron, it appeared that the defendants, who are custom-house officers, had seized some hams near Carlisle, which the plaintiff was sending in three several carts from Scotland to Carlisle. The plaintiff obtained one permit for the whole; but owing to some accident, two of the carts were at the distance of two miles behind the other when the defendants met the first and demanded the permit; the driver informed them that the permit was with the other carts, which came up in an hour and a half afterwards, before the first reached Carlisle, but not till the officer, after waiting some time without seeing the other carts, had made the seizure. They were all three driven to the custom-house at Carlisle, the defendants saying they could not release them unless the collector were applied to. When the whole was explained to the collector, he said he would have no concern in the taking; and the defendants then refused to give up the carts with the cargoes unless the plaintiff would give them 2*l.* 11*s.*; which he accordingly did. It was objected on the part of the defendants that the plaintiff, by this transaction with revenue officers, had incurred a penalty of 50*l.* and that he could not recover back the money which he had paid to have the goods which had been seized returned to him; and the plaintiff, was nonsuited, with leave to move to set that *nonsuit aside, and to enter up a verdict for him, if this Court should be of opinion that the plaintiff could maintain this action.

1791.
 IRVING
 v.
 WILSON.

[*486]

A rule having been obtained on a former day by *Law* to shew cause why the nonsuit should not be set aside,

Cockell, Serjt. now showed cause; saying, that this payment must be considered either as a bribe to the officers for the release of the goods, which they had a probable cause to seize, in which case the plaintiff and defendants were *in pari delicto*; or as a voluntary payment to the officers for their trouble; in either of which cases the plaintiff could not recover back the money paid; but, in whatever light the payment is considered, as it is admitted that this action is brought against the defendants as custom-house officers, for an act done by them in that character, they were

1791.
IRVING
v.
WILSON.

entitled to a month's notice before the action was brought, under the 23 Geo. III. c. 70, s. 30, and 24 G. III. c. 46, s. 39; for they ought to have had an opportunity of tendering amends.

LORD KENYON, Ch. J. :

The revenue laws ought not to be made the means of oppressing the subject. Here, a permit having been granted for the whole quantity of goods, and which was with the other carts behind at the time of the seizure, the seizure was clearly illegal. The permit for the entire quantity, could not be separated and distributed to each of the carts. And therefore whatever ground of probability there was for stopping the first cart, yet after the matter was cleared up, there was no pretence for making a seizure; and it was highly improper in the officers to take the money. If goods liable to a forfeiture be forfeited, the officer is to seize them for the king; but he is not to be permitted to abuse the duties of his station, and to make it a mode of extortion. Here the defendants took the money under circumstances which could by no possibility justify them, and therefore this could not be called a voluntary payment; but it was extorted from the plaintiff, and in that case no notice to the defendants was necessary.

ASHHURST, J. :

I agree that if this money had been paid as a bribe, both parties would have been *in pari delicto*, and the plaintiff would not be entitled to recover: but here the plaintiff was in no fault whatever: this money was not paid as a bribe; for the goods were not liable to seizure. Neither was it a voluntary payment; for when the defendants had stopped the goods, the plaintiff was in their power. The defendants acted right in stopping the goods at first; but when the permit came *up, there was no pretence to detain them,—still less to take the money. It was a payment by coercion; and which the plaintiff may recover from the defendants as money unconscientiously received by them.

[487*]

GROSE, J. :†

If an officer seize goods as forfeited, he does it *colore officii*:

† Absent Buller, J.

but if he take money for delivering up the goods, there is no pretence to say that that is done *colore officii*; and such money may be recovered back again in an action of this kind. I admit that in an action of trespass, or tort, the officers are entitled to notice under the 23 Geo. III. c. 70, s. 30; because they ought to have an opportunity of tendering amends: but that Act does not extend to an action of assumpsit.

1791.
IRVING
v.
WILSON.

Rule absolute.

KENNARD v. JONES.

(4 T. R. 495—496.)

1791.
Nov. 28.
[495]

If it appear to the Court that the debt sued for is under 40s. they will, on motion, stay the proceedings before trial.* [See *Wellington v. Arters*, 5 T. R. 64, reported p. 544, *post*, and later cases there referred to.]

BALDWIN moved that all proceedings might be stayed in this action, on an affidavit by the defendant that, on applying to the plaintiff's attorney to know what the debt was, he said that it was a guinea and an half. He contended, that as the debt was under 40s. the Court could not take cognizance of it; and they would not suffer the defendant to be harassed by going on to trial. This being admitted to be a novel application,

The Court had some doubt;

BULLER, J. saying that the practice had been not to grant such rules in this Court, unless the demand appeared to be under 40s. on the record: but Lord KENYON saying that he remembered many applications of this sort in the Exchequer, the Court granted a rule *nisi*: against which

Manley now shewed cause, not denying the fact, but stating that the application ought to have been made sooner, if at all;

* This and similar cases appear to be referred to, generally, by Lord Blackburn in *The Metropolitan Bank v. Pooley* (1885) 10 App. Ca. 210, 220; 54 L. J. Q. B. 449.—R. C.

1791.
KENNARD

v.
JONES.

[*496]

for *that the defendant was under short notice of trial; but he offered to refer the whole to the Master.

Lord KENYON, Ch. J. (stopping the other side) said, that that offer could not be acceded to now. This is a very general question, which concerns the practice of the Court, Whether it shall be permitted to parties to sue in the superior Courts for such small sums as those under 40s. ? Now that is expressly prohibited by Act of Parliament†; and therefore, upon consideration, we are of opinion, that the rule should be made absolute, but not with costs, as this is the first application of the kind.

Per CURIAM :

Rule absolute.

K. B. HILARY TERM.

1792.
Jan. 26.

[503]

DOULSON v. MATTHEWS AND ANOTHER.

(4 T. B. 503—504.)

Trespass will not lie in this country for entering a house in Canada.

THIS was an action of trespass for entering the plaintiff's dwelling-house in Canada, and expelling him : there was another count for taking his goods ; but as there was no proof to support the second count, the only question was, Whether an action of trespass could be brought in this country for the injury stated in the first count ? Lord KENYON, at the trial, was clearly of opinion that the cause of action stated in that count was local : and as the plaintiff could not support the second count, he was nonsuited.

Erskine now moved to set aside that nonsuit ; observing, that this was not an action to recover the land, but merely a personal action to recover a satisfaction in damages, which was

† 6 Ed. I. c. 8.

transitory, and might be tried here. In a case of a similar nature, Lord MANSFIELD was of opinion that the action might be tried in this country. It was an action brought against Captain Gambier, for pulling down, by order of Admiral Boscawen, the houses of some sutlers, upon the coasts of Nova Scotia, who supplied the sailors with spirituous liquors. In another case † Lord MANSFIELD himself mentioned this, and said, “The objection *was taken to the count for pulling down the houses; and the case of *Skinner* and *The East India Company* ‡ was cited in support of the objection. On the other side they produced, from a manuscript note, a case before Lord Ch. J. EYRE, where he overruled the objection. And I overruled the objection upon this principle, namely, that the reparation here was personal, and for damages; and that otherwise there would be a failure of justice; for it was upon the coast of Nova Scotia, where there were no regular courts of judicature: but if there had been, Captain Gambier might never go there again; and therefore the reason of locality in such an action in England did not hold.” But

1792.
DOULSON
v.
MATTHEWS.

[*504]

Lord KENYON, Ch. J. said, that the contrary had been held in a case in the Common Pleas; that where the action is on the realty, it is local.

BULLER, J. :

It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions: it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local.

Rule refused. §

Note.—The distinction between actions as “local and transitory” as a technical distinction depending on local venue is obsolete by the Judicature Acts; but it is still an open question

† Cowp. 180. † Cowp. 167. battery in Newfoundland, 7 Mod.
§ An information was denied for a 193.

1792.
DOULSON
v.
MATTHEWS.

how far the principles to be gathered from the old decisions apply to an action which in certain aspects relates to land in a foreign country. *Dicta*, although there is no decision, bearing upon this question, will be found in *Whitaker v. Forbes* (C. A. 1875), 1 C. P. D. 51, 45 L. J. C. P. 140 (a case decided after the Judicature Acts, but not within their operation); and *The M. Moxham* (C. A. 1876), 1 P. D. 107, 109. *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28, 40 L. J. Q. B. 28, was a case before the Acts, in which important questions of jurisdiction were discussed.—R. C.

1792.
Jan. 31.
[514]

BARRY v. BEBBINGTON.

(4 T. R. 514—516.)

Where the right to the soil is in issue, entries written by the steward of a former owner from whom title is derived are admissible evidence, if the steward be dead.

THIS was an action of trespass, wherein the issue was on the soil and freehold of the defendant. At the trial at Chester, the plaintiff, who derived title under Lord Barrymore, offered in evidence several items contained in a book in the handwriting of one Ashley, who had many years ago been steward to Lord Barrymore, and was now dead. The manuscript was a common day book, not particularly appropriated to Ashley's concerns with Lord Barrymore, but containing a variety of other matters relating to his different employers; and the items in question, three in number, were memoranda of receipts of sums of money by Ashley from different persons by name, but whose situations were not mentioned, for trespasses committed on the common in question, paid on account of Lord Barrymore; the first item was dated in 1739, the last in 1785. This evidence was rejected; and a verdict having been given for the defendant, a rule was obtained in the last Term, calling on him to shew cause why there should not be a new trial, on the authority of *Warren v. Grenville*.*

[*Leycester, Topping, and Abbott*, having shewed cause,]

* 2 Str. 1129. *Vide* 2 Burr. 1072.

LORD KENTON, Ch. J. (stopping the counsel on the other side) :

We are not now called upon to determine what weight this evidence ought to have in this cause : and perhaps it may turn out on farther investigation that these were small sums of money, and paid by persons in poor circumstances to the lord of *the manor, with whom they were not in a situation to contend ; but the single question here is, Whether these entries be not admissible evidence ? It is clear that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury, to shew that such sum was received by him. But it has been objected that the steward's accounts should have been signed by him : if the entry be not in the handwriting of the steward, undoubtedly it must be signed by him : but here all these entries were written by the steward himself, and therefore they were evidence to charge him with the receipt of the money ; and if so, they should have been received in evidence on the trial of this cause, though probably they may not have much weight before the jury.

1792.
BARRY
v.
BEBBING-
TON.
[515]
[*516]

ASHHURST, J. :

The rule is, that if a steward's entry be sufficient to charge him, it is admissible evidence ; and these entries were undoubtedly sufficient to charge him. Suppose Lord Barrymore had brought an action against the steward for money had and received, he might have given him notice to produce the books in which these entries were made, and they would have charged the steward with the receipt of these sums.

BULLER, and GROSE, Justices, agreeing,

The rule was made absolute.

1792.
Feb. 9.
[516]

PERRY AND OTHERS v. JACKSON, BART., AND OTHERS.

(4 T. R. 516—520.)

If one plaintiff be abroad, and the others in England, the action must be brought within six years after the cause of action arises.

THIS was an action on a bill of exchange for 100*l.* by the payees against the drawers. The declaration stated that the defendants, on the 24th of November, 1767, at New York, in parts beyond the seas, to wit, at London; &c. drew the bill in question, requesting R. Willis to pay at 40 days' sight the contents to the plaintiffs; that Willis in January, 1768, refused to accept, and afterwards to pay it; by reason whereof, and according to the usage and custom of merchants the defendants became liable to pay, &c. The defendants pleaded severally the statute of limitations; to which the plaintiffs replied, that when the cause of action accrued to the plaintiffs, one of whom was abroad in parts beyond the seas and out of the kingdom of Great Britain, to wit, at New York, in America; and that he remained so abroad in parts beyond the seas continually from thence until October, 1787, when he returned, &c.; averring that they exhibited their bill *within six years after his return. The defendants demurred generally to these replications.

[*517]

[*Baldwin* and *Adams* in support of the demurrers, contended, That the reason of the proviso as to persons under disability (under 21 Jac. I. c. 16, s. 3) only holds in the case of a single plaintiff residing abroad; for when there are several plaintiffs, and one of them resides in this country, he may do every act to bind his partners which they themselves might have done if they were all present. Where several persons are debtors, it has been held † that the acknowledgment by one is sufficient to take the case of all out of the statute of limitations. The same rule ought to prevail where they are creditors, and the ability of one to sue for all, ought to take such case out of the proviso.

[*Wood* was heard on the other side.]

† *Whitcomb v. Whiting*, Doug. 652, 3rd edit.

LORD KENYON, Ch. J. :

It is rather singular that this is the first time that this question has been brought into a Court of law, though the circumstance upon which the question arises must have frequently occurred. It being admitted that there is no decided case on this point, it must depend on the reasonable construction to be put upon this Act of Parliament. The *proviso on which the question arises was introduced into this statute, in order to protect the interests of those persons which there was no one of competent age, of competent understanding, or competent in point of residence in this country, to protect. Now two of the plaintiffs in this cause have always been resident here; and it was their duty to watch over those interests in which they themselves were equally concerned with the partner who resided abroad. It is admitted that one partner may do several acts to bind the interests of all; he may release as well as create a debt; he may also by his acknowledgment take a case out of the statute of limitations; and I see no reason why the same rule should not hold also in the present instance. The third section of this Act of Parliament limits the time of bringing actions on the case, in all cases, to six years after the cause of action accrues; the plaintiffs therefore were bound to commence their action at an earlier period, unless they come within the exception in the last clause of the Act, by which it is enacted "That if any person or persons entitled to such actions, &c. be beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they take the same within such time as before limited after their return from beyond the seas, as other persons having no such impediment might have done." Now the words of this clause, grammatically speaking, do not apply to the present case; they only extend to cases where the person individually, a single plaintiff, or persons in the plural, when there are several plaintiffs, are not in a situation to protect their interests. Neither does this case come within the policy of the law, which provides that, if parties neglect their interests for such a length of time as six years, they shall lose the benefit of suing to enforce their demands. I am therefore clearly of opinion, both on the words of the Act of Parliament, and on

1792.

PERRY
v.
JACKSON.
[518]

[*519]

1792.
PERRY
v.
JACKSON.
[519—520]

grounds of policy, that the plaintiffs are barred by the statute of James.

[ASHHURST, J. and BULLER, J. concurred. GROSE, J. absent.]

* * * * *



1792.
Feb. 3.

THE KING v. PAGE.
(4 T. R. 543—550.)

Where by a navigation-act the proprietor was entitled to a toll of 4s. per ton for goods carried from A. to B. or from B. to A. and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection, it was held, that the tolls for goods carried the whole voyage from A. to B. are rateable in B. though in fact they are collected in a parish between A. and B.; because the tolls become due where the voyage is completed.

[THE defendant having been rated towards the relief of the poor of the parish of Newbury for the tolls of the navigation of the river Kennet; a case was stated for the opinion of the Court concerning the incidence of such a rate in respect of such tolls. The points of the case appear from the following judgments:]

[546] LORD KENYON, Ch. J. :

This case does not admit of much doubt, whether it be considered on grounds of policy, on the words of this Act of Parliament,* or on authorities. By the terms of this Act of Parliament a toll of 4s. per ton is imposed on all goods carried up the river Kennet from Reading to Newbury; that toll of 4s. is one integral toll for that integral voyage. The case states that many barges are navigated on this river; some of which perform the whole voyage up to Newbury, some the whole voyage down to Reading, and some intermediate voyages; and, in ascertaining this rate, the Sessions expressly state that the rate is imposed on the appellant in respect only of the tolls which are received for goods carried up the whole navigation from Reading to Newbury. The cases which have been cited, do not bear upon the present. In the *Hamptonwick* case, the rate was on a piece of ground adjoin-

* 1 Geo. I. c. 24 (private Act).

ing the river, *which was used as a towing-path: there the Court had no difficulty in saying that the occupier ought to be rated for it, because he was in the possession of land yielding an annual profit. In *R. v. Cardington* † it was stated that the tolls became due for passing through every sluice: that therefore was a local toll payable at the place where the sluice was erected. In *The Aire and Calder* case,‡ no integral toll was imposed for the whole navigation, but a proportionable toll according to the distance which each vessel should go, at so much per mile: there, it was sufficient to say that something was due at the extreme parishes, for which the undertakers were there rateable, without entering into the quantum of the rate. It was not necessary there to determine whether anything were due in the intermediate parishes, because the tolls became due at so much per mile; it will be sufficient to decide that question whenever it arises; but arguments of policy and justice have been now urged; and it has been said that the tolls should be considered to be due in each parish in respect of the quantity of land occupied by the navigation: but hard would be the lot of the officers who are to make the rates in these several parishes; they would have to measure not only the length but the breadth of the navigation in each respective parish, and to ascertain with precision the exact quantity of land covered with water; those difficulties would be insuperable; and it would be in vain to think of rating at all, if such were the rule. In the case of Putney Bridge § the toll was not apportioned in respect of the quantity of land over which the turnpike road led; but the toll was collected on the spot where it was held rateable. The ground on which my opinion proceeds, is, that where a person has a valuable interest in any parish or township, he ought to contribute towards the relief of the poor in that parish in proportion to such valuable interest. Here the appellant was rated in respect of those tolls only which became due at Newbury, the place where the navigation finishes, and where the goods were delivered; but it is said that they were not in fact collected in Newbury, and that they became due where they were collected,

1792.
THE KING
v.
PAGE.
[*547]

† Cowp. 581.

Calder Navigation, 2 T. R. 660.

‡ *R. v. Undertakers of the Aire and*

§ Dougl. 305 n.

1792.
THE KING
v.
PAGE.

[*548]

the proprietor having power by the Act of Parliament of appointing the place of collection where he pleases : but certainly there is no justice in that ; for the proprietor might appoint a place of collection not in any parish through which the navigation passes. What was said by my brother BULLER in the **Hamptonwick* case,† that the tolls which became due at Hamptonwick could not have been rated in London if the corporation had chosen to receive them at Guildhall, is an answer to this part of the argument ; and indeed it might as well be contended that an estate is rateable where the steward thought proper to receive the rents. I am therefore clearly of opinion that the justices in their sessions have done right in confirming this rate, by which the appellant is assessed only for those tolls which became due at Newbury in respect of the integral voyage from Reading to that place ; but I desire that this opinion may not be applied to other cases, where the undertakers of a navigation are entitled to so much per mile for intermediate voyages.

ASHHURST, J. :

It being stated in the case that the annual value of the tolls for the whole navigation is 1,000*l.*, 400*l.* of which arise for the entire voyage ending at Newbury, I have no difficulty in saying that the latter tolls become due at Newbury the instant the goods are landed there. Though the proprietor of this navigation may, for his own convenience, appoint any place on the side of the river to collect the tolls, and though in fact they are collected out of the parish of Newbury, yet they become due at the place where the goods are landed. The case of *Rivers v. Page*, which was cited, I think must have proceeded on some other ground than that stated. I do not see how the owner of the navigation could distrain for the toll till it became due ; and the toll did not become due till the voyage was completed. But here I think that the appellant should be rated for 400*l.* in Newbury, because tolls to that amount annually become due in that parish.

BULLER, J. :

Two objections have been made against this rate : if either of

† *R. v. Mayor, &c. of London*, 4 T. R. 21 (not reported in Revised Reports).

them be well founded, the appellant must succeed. First, That the tolls ought to be rated according to the proportion of the navigation in each parish; or, secondly, That they should be rated at Aldermaston where they are received; for which reason it has been argued that they become due there. But under the express words of this Act of Parliament, the proprietor may appoint what place he chooses from time to time; and therefore it would be very inconvenient to fix that as the place in which they should be rated. The true question here is, as it was in the *Aire and Calder Navigation*, Where did the tolls become due? At common law there could be no doubt about this question; for if goods be not carried to the place of destination, the captain of the vessel is not entitled to any freight; for this reason, that he has not performed his *contract; he must go to the port of delivery before he is entitled to anything. If that be so at common law, it becomes necessary to inquire whether this Act of Parliament has made any difference in this case. The statute gives the proprietor of the navigation a toll of 4s. per ton for goods carried from Reading to Newbury; and gives him the power of collecting those tolls where he pleases; but that does not alter the contract between the owner of the goods and the proprietor of the navigation: and though, according to the case of *Rivers v. Page*, the tolls may be demanded before the voyage is performed, yet if the voyage be not afterwards completed, the owner of the goods may recover back the tolls in an action for money had and received. The clause in this Act enabling the proprietor to collect the tolls in any place he chooses, was introduced for his benefit; but still the tolls must be demanded according to the rules of law respecting the carriage of goods from one place to another. This case falls directly within the principle of that of the *Aire and Calder*; where it was held that the tolls ought to be rated in the parish where they become due; and that is the place of delivery. In the report of that case it is stated that the undertakers were entitled to tolls "according to the distance which such goods should be carried;" that is, the whole voyage: according to my recollection the Act of Parliament in that case did not say that the undertakers should be entitled to so much for each mile; and though an Act does mention the

1792.
THE KING
v.
PAGE.

[*549]

1792.
THE KING
v.
PAGE.

rate per mile, it is only used as the means of ascertaining what is due for the whole voyage ; for the toll cannot be due till the voyage be completed.

GROSE, J. :

[*550]

The short question is, Whether this property be liable to be rated in Newbury?—which depends on this : At what place are these tolls to be considered as property ? Most clearly, at the place where they become due ; and I think they become due where the voyage is finished, for till then the carrier could not recover anything at common law ; but it has been said that a case was decided in the Common Pleas, in which it was held that a distress might be taken for tolls before the voyage is perfected : if such were the case, it must have been decided on the special provision in this Act, which enables the proprietor of this navigation to collect the tolls where he pleases ; but that clause did not mean to say that the tolls did not become due in law at the place where the voyage was completed, and where the goods were landed and delivered. *The observation of my brother BULLER is decisive on this head, that even after a distress the owner of the goods might recover back the tolls, if the voyage were not afterwards performed, and the goods delivered according to the contract. Then it was argued that the appellant should be rated for these tolls at Aldermaston, where they are collected : but if we should so determine this case, we should open a door to fraud ; for then the proprietor would fix a place of collection in some parish where the poor rates are the lightest, which could not be within the meaning of the Act.

MUNT AND ANOTHER, EXECUTORS, &c. v. STOKES AND
ANOTHER.

(4 T. R. 561—565.)

1792.
Feb. 7.

[561]

The testator having borrowed money on a *respondentia* contract prohibited by the laws of this country, his executors the plaintiffs refunded the money to the lenders, the defendants; the Court held, that the executors could not maintain an action for money had and received to recover back this money, notwithstanding the defendants could not have compelled them to pay it.

THIS was an action to recover 2,004*l.* 8*s.* 4*d.* for money had and received by the defendants for the use of the plaintiffs as executors of A. M'Intosh: the defendants pleaded the general issue; and at the trial a special case was reserved, stating the following facts:

In January, 1785, the plaintiff's testator Alexander M'Intosh was at Calcutta in Bengal, in the East Indies, with the ship *Hussar*, carrying Danish colours, whereof he was at that time master and owner. By the laws of Denmark, all persons who are masters of ships belonging to Danish ports, and carrying the Danish flag, must be either natural born subjects of the kingdom of Denmark, or become denizens of Denmark, and take the oaths of allegiance to the king of Denmark. On the 6th of January, 1785, M'Intosh borrowed at Calcutta of the defendants (being British subjects) 20,000 current rupees upon the terms mentioned in the condition of a *respondentia* bond (which was stated). The condition (after reciting that M'Intosh had taken up and received of the defendants 20,000 current rupees, making 2,166*l.* 13*s.* 4*d.* to run at *respondentia* on the ship *Hussar*, of which M'Intosh was the commander, and her guns, arms, ammunition, stores, &c., and also upon the goods and merchandises laden and to be laden on board during her voyage bound from Calcutta from out of the river Hoogly to the coast of Coromandel, and thence to proceed for and arrive at Copenhagen in Denmark, being to sail on the 31st of January from out of the river Hoogly, at the rate of 10*l.* per cent. for the voyage) was, that *if the *Hussar* did sail on the above voyage, and arrive at Copenhagen before the end of nine months, to be computed from the day of leaving Calcutta, when also the risk of the *respondentia* lender commenced, and if

[*562]

1792.
MUNT
v.
STOKES.

M'Intosh, his heirs, executors, &c., before the end of nine months, &c., paid to the defendants, &c., the principal sum of 2,166*l.* 18*s.* 4*d.* in London, together with the premium of 10*l.* per cent. for the voyage, if the same were performed within nine months, &c., and if any longer, *pro ratâ*: in consideration of which premium, the usual risk of rivers, violence of the seas, &c., was to be on account of the defendants; and in case of the loss of the ship, M'Intosh, his heirs, executors, &c., did within six months next after such loss, or as soon after as such average should be ascertained, pay to the defendants such average or proportion as by custom should become due on the salvage, then the obligation was to be void. A. M'Intosh soon afterwards sailed in the ship the *Hussar*, with Danish colours, from Calcutta to the coast of Coromandel, and there took goods on board, and from thence sailed for Copenhagen. In December, 1785, A. M'Intosh died, having first made his will, and appointed the plaintiffs and four others executors. The plaintiffs alone proved the will in the prerogative Court of Canterbury. On 12th October, 1786, the plaintiffs, upon application to them by the defendants, paid to the defendants 2,004*l.* 3*s.* 4*d.* in discharge of the bond so entered into by M'Intosh.

Romilly, for the plaintiffs:

First, The defendants could not have recovered this money on the bond, either from the plaintiffs or their testator, the transaction being void by stat. 7 Geo. I. c. 21, s. 2; and 21 Geo. III. c. 65, s. 29 (which was admitted). Secondly, The plaintiffs, having paid it, are entitled to recover it back. In all cases, except two, where a party has paid money under a mistake, either of fact or of law, he may recover it back again in an action for money had and received, *Farmer v. Arundell*, 2 Bl. Rep. 824. The two excepted cases are, first, Where he was bound in conscience, though not in law, to make the payment; secondly, Where he is *particeps criminis*; but this case does not fall within either of those exceptions. [To bring the person within the latter exception he must have been *in pari delicto*, and the Courts, in applying this principle have discriminated between the different degrees of guilt;] and they have held that money paid for insur-

ing tickets in the lottery may be recovered back from the office-keeper,† because the Legislature considered the insurer as more culpable than the insured, but that money paid by the lottery-office-keeper, in consequence of having insured tickets, cannot; ‡ and in both those cases is the transaction prohibited by statute. It must be admitted indeed that, if the testator had paid this money, the executors could not have recovered it back, because they must have claimed it as money had and received to the testator's use, and then the case would have come within both these exceptions; but, as between these parties, it will be a case of greater hardship on the plaintiffs if they cannot recover, than on the defendants if they should be compelled to refund; because the plaintiffs cannot retain the money out of the testator's assets, but the loss must be borne by the plaintiffs individually, who are perfectly innocent, whereas the defendants were parties to the illegal contract. * * *

1792.
MUNT
v.
STOKES.

LORD KENYON, Ch. J. (stopping *Law, contra*):

It has been said that this was not a debt which the plaintiffs were bound in conscience to pay to the defendants; but I think that they were bound both in honour and conscience to refund the money which the defendants had advanced, though the original contract were contrary to a positive law; for this is not a penalty, but money *which the defendants had actually advanced; and the original contract was not *malum in se*, but *malum prohibitum*. Though the security on which this money was borrowed was void by the statute, I do not know but that an action for money had and received might have been maintained by the defendants to recover back this money: the cases cited relative to premiums go a great way to shew that; but the ground on which I go is this, that there was no misrepresentation or any improper conduct by the defendants to extort the money from the plaintiffs; but the plaintiffs, knowing the whole transaction, and the law also, as they were bound to know, voluntarily paid it. There was nothing contrary to conscience in

[*564]

† *Jaques v. Golightly*, 2 Bl. Rep. 1073; *Jaques v. Whitby*, 1 H. Bl. 65.

‡ *Browning v. Morris*, Cowp. 790.

1792.
MUNT
v.
STOKES.

the defendant's receiving the money which they had advanced; the plaintiffs therefore are not entitled either in law or in equity to recover it back again. This is not like a case which I remember many years ago, where an action was brought to recover the excess of a copyhold fine: there it was held, that the money might be recovered back in an action for money had and received against the steward, because he had used coercion to obtain payment of the excessive fine; he would not deliver the title-deeds without. Nor is this a case of singular hardship against the executors; for where executors pay a debt of an inferior nature, though conscientiously, and without any view to prefer one creditor to another, the loss must be borne by them individually, if the assets be insufficient to pay all the debts of a higher nature. Without going into the question of form, upon which I should be sorry to have the case decided, I am clearly of opinion that on the merits the plaintiffs are not entitled to recover.

BULLER, J. :

In the case of illegal contracts, one party cannot recover against the other on the contract itself: but if he come to rescind the contract, he may recover back so much money as has been paid. This was established in *Jaques v. Golightly*, and in *Lowry v. Bourdieu*.† If the party come into a Court of justice to enforce an illegal contract, two answers may be given to his demand: the one, that he must draw justice from a pure fountain; and the other, that *potior est conditio possidentis*. Such would have been this case if the plaintiffs had not paid the money, and an action had been brought on the contract: but, the plaintiffs having paid it, the question is: Whether the defendants retain the money against conscience? I think they do not, because they have only received back the money which they had before *advanced to the plaintiff's testator. I also think that the point of form is against the plaintiffs: they should have declared in their own right, and not as executors. At all events, if the action be brought by the executors, all of them should have joined; and this is a defect in the plaintiff's title. Where indeed

[*565]

† Dougl. 468, 3rd edit.

several are named executors, and one only proves the will and acts, that one is liable to an action; but he cannot sue alone, until the others have renounced.

1792.
MUNT
v.
STOKES.

*Postea to the defendants.**

GORTON AND ANOTHER v. FALKNER.

(4 T. R. 565—570.)

1792.
Feb. 7.

Implements of trade may be distrained for rent, if they be not in actual use at the time, and if there be no other sufficient distress on the premises.†

[565]

In trover for three looms, for weaving small wares, a special case was reserved. The plaintiffs, being manufacturers of small wares at Manchester, employed one R. Minikin, as a small-ware weaver there, to make linen and cotton tapes for them; and for that purpose, in August last, lent him two looms, one for himself and the other for his wife, to weave upon; and afterwards, in October last, on application by Minikin, lent him another loom. Minikin and his wife worked upon two of the looms; and Boardman (Minikin's journeyman) had been seen to work on one of them. The looms were used and worked upon in a part of a house in which Minikin resided at Manchester, which was let to him by the defendant. For the use of the looms Minikin was not to pay the plaintiffs anything; but he was to work for the plaintiffs only. The case also stated, that it is customary at Manchester for persons in the small-ware trade to lend their workmen looms to weave upon, without receiving anything for the use of such as are for weaving linen or cotton tapes; but it is common for workmen to pay for the hire of such as are for weaving worsted tapes; and all the looms in question were for weaving linen and cotton tapes. Minikin being tenant to the defendant of part of his house, and rent being due for the same, the defendant distrained the looms so lent to Minikin by the plaintiffs for rent upon the premises; and afterwards, according to the statute, appraised and sold the same. At

* Vide *Cockerill v. Kynaston*, ante, † See 51 & 52 Vict. c. 21, s. 4.
277, 7 Mod. 246.

1792.

GORTON

v.

FALKNER.

[566]

the time of the distress, there were no other goods upon the premises.

S. Heywood for the plaintiffs :

* * * Though, generally speaking, all moveable chattels may now be distrained, whether they partake of the profits of the soil or not, yet certain things have always been considered as privileged, among which are utensils or instruments of trade, because it is for the benefit of trade, and for the public good, that they should be protected : Co. Lit. 47. a. So a mill-stone in a mill, and an anvil in the smith's shop, are privileged, though the anvil be removed out of the stock, or the mill-stone out of the mill to be picked : 14 Hen. VIII. 26. These looms were equally protected from a distress for rent, if they be considered as the property of the plaintiffs. They were lent to the workmen, to enable them to work up certain goods for the plaintiffs ; and all the reasons urged on the former ground are equally applicable to this : it is for the benefit of trade that implements of trade, thus lent to workmen, should be privileged from distress for rent : and therefore this comes within the allowed exemption. * * *

Holroyd, contra, was stopped by the Court.

LORD KENYON, Ch. J. :

[567]

* * * We may lay it down as a general proposition, that at this time all moveable chattels are distrainable, whatever may have been said in ancient times to restrain the distress on those things which partook of the profits of the soil : now, not only living animals, but also inanimate things, may be distrained. But to this general proposition there are several exceptions : some things are exempt from being distrained, on account of the place ; and others, on account of the things themselves. The anvil in the smith's shop, and the mill-stone are privileged, because they are affixed to the freehold ; and a temporary removal of the one or the other, for the purpose stated in the argument, is not sufficient to destroy that privilege. In the case of *Francis v. Wyatt** the question was, Whether a livery-stable had the same privilege

* 1 Bl. Rep. 483 ; and 3 Burr. 1498.

as a common inn, so as to protect a carriage standing at livery? The Court thought that the same reason did not exist in both cases, and therefore that the privilege of the common inn should not be extended to a livery-stable. There are several other exemptions, which it is not necessary to state particularly; they are all collected in 3 Com. Dig. 112, 118; from whence it appears, that utensils of trade are not liable to be distrained while they are in actual use. One of the instances given is, that of an axe in a carpenter's hand, and this exemption is founded on good sense; it is allowed not only for the convenience of trade, but for the preservation of the peace. *Averia caruæ* are also privileged, provided there be other sufficient distress; but if not, they may be distrained. Now in this case it is not stated that these looms were in actual use at the time of the distress, though they had been used and worked upon, which is too loose and indefinite a finding to warrant us in supposing that they were then in use; and it is stated that there were no other goods upon the premises liable to the distress. Therefore, I am of opinion that the distress was properly made.

1792.
GORTON
v.
FALKNER.

ASHHURST, J. :

[568]

It is a general principle, that all chattels found in a person's house are liable to be distrained by the landlord: it is true indeed that there are some exceptions to the general rule; but this case does not come within either of those exceptions. The foundation of this principle is, that as the landlord is supposed to give credit to a visible stock on the premises, he ought to have recourse to every thing which he finds there. Now it does not appear from the facts stated in this case that the looms were privileged from a distress. It is not found that they were in work at the time of the distress; but it is stated that there were no other goods liable to be distrained; and it is a general rule, that implements of trade may be distrained, if there be no other goods subject to a distress.

BULLER, J. :

Whether goods be the property of the tenant or a stranger is perfectly immaterial, provided they be on the premises, and be

K. B. EASTER TERM.

1792.
April 24.

[581]

GARSDIE v. THE PROPRIETORS OF THE TRENT
AND MERSEY NAVIGATION.

(4 T. R. 581—583.)

A common carrier between A. and B. employed to carry goods from A. to B. to be forwarded to C. carried them to B., there put them in his warehouse, in which they were destroyed by an accidental fire before he had an opportunity of forwarding them. He was held not answerable for the loss. (*Hyde v. same Defendants*, p. 620, *post*; *Rowe v. Pickford*, 8 Taunt. 83; *Chapman v. G. W. Ry. Co.* (1880), 5 Q. B. D. 278, 280, 49 L. J. Q. B. 420.)

[582]

[Goods, (consisting of four pockets of hops) directed to the plaintiff at Stockport, were delivered to the defendants to be carried by them from Stourport to Manchester. The goods arrived safe at Manchester on the 30th of September,] were that evening put into the defendant's warehouse there, where (together with other goods) they were consumed by an accidental fire that night, and before any carrier came from Stockport, to whom they could be delivered. It also appeared that, according to the course of business, when goods are sent from Stourport to go beyond Manchester, if any carrier to the place of their destination be at Manchester ready to receive them, they are immediately delivered upon payment of the carriage from Stourport to Manchester; and if not, the defendants keep them in their warehouse till a carrier arrive to whom they may be delivered, on making the above payment, the defendants not charging anything for lodging and keeping the goods in their warehouse. Some time before the goods in question were delivered to the defendants, their agent told the plaintiff that if he would send all his goods by them they would forward them to Stockport by the first carrier that should come there, without insisting on being paid for the carriage before they delivered them, and would settle with him when they met. [On the trial of an action for the loss of the goods,] a verdict was taken for the defendants, with liberty

to the plaintiff to move to set it aside and to enter up a verdict for him, if this Court should be of opinion that the defendants were answerable under these circumstances.

1792.
GARRIDE
v.
THE TRENT
NAVIGA-
TION.

Bower accordingly now moved to set aside the verdict ; contending that the defendants were responsible, as their contract was to carry the goods to Manchester, and to keep them safe at that place till they could be forwarded to Stockport ; and that it was for their convenience that the goods were deposited in their warehouse.

The Court refused even a rule to shew cause.

LORD KENYON, Ch. J. said :

If the defendants were considered merely as warehousemen, there would be no pretence to say that they were liable for such an accident as the present. The case of a carrier stands by itself upon peculiar grounds ; he is held responsible as an insurer ; and the reason given in the books (whether well or ill-founded, is immaterial here) is to prevent fraud. But I do not see how we can couple the character of the carrier with that of the warehouseman, in which last the defendants are not liable here, they not having been guilty of laches.

BULLER, J. :

The keeping of the goods in the warehouse is not for the convenience of the carrier, but of the owner of the *goods ; for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly ; and it was only because there was no person ready at Manchester to receive these goods, that the defendants were obliged to keep them.

[*583]

Rule refused.

1792.
April 28.
 [589]

HALL v. LAWRENCE.

(4 T. R. 589.)

The Court will not set aside the award of an umpire because he received the evidence from the arbitrators without examining the witnesses, unless he were required to re-examine them before the making of his award. [*Tunno and Bird*, 5 B. & Ad. 488, 495.]

THE parties having referred all matters in difference to the award of two arbitrators, or, in case of their disagreeing, of an umpire, the arbitrators regularly heard all the evidence; but, disagreeing, stated this evidence to the umpire; on which he made his award without re-examining the witnesses. After he had made the award, the party against whom it was made applied to him to hear the evidence himself, and, on his refusing, moved this Court to set aside the award: But

The Court thought that, as no application was made to the umpire to examine the witnesses before he had made his award, the

Rule should be discharged with costs.

Gibbs in support of the rule.

Bower, contrd.

1792.
May 2.

THE KING v. THE INHABITANTS OF ESSEX.

(4 T. R. 591—596.)

If a fine be imposed on a county, which the justices at the Sessions think illegal, they may order the treasurer to defray the expense of litigating the question out of the county stock.

[*592] A FINE having been imposed by Lord LOUGHBOROUGH, when going the Home Circuit in the year 1789, upon the county of Essex, for neglecting to repair the county gaol, and that *fine having been estreated in the Exchequer, the legality of it was there litigated by the direction of the county magistrates, who,

in order to defray the expenses of such litigation, made the following order at the Quarter Sessions: "It is ordered by this Court, that the further sum of 150*l.* be advanced by the treasurer of this county to W. Bullock, Esq. clerk of the peace for the said county, on account of the expenses of defending the inhabitants of the said county from the fine† imposed on them by Lord LOUGHBOROUGH, subject to the discussion of any right that the county have to dispute the payment of such money." This order having been removed by *certiorari* into this Court, and a rule having been obtained to shew cause why it should not be quashed:

1792.
THE KING
v.
The Inhabitants of
Essex.

[After argument]:

LORD KENYON, Ch. J.:

[593]

If the contest in this case had been, Whether the justices of the county could arbitrarily impose taxes on the county, the only answer that could have been given would have been in the negative. But the question here is, Where, by any express law, or by precedent and long usage, that which has been done was not lawfully done; and if it be warranted by precedent and long usage, and by *many analogous cases in the law, the order may be supported, though there be no precise Act of Parliament to direct it. Long before the statute alluded to, various duties were imposed upon counties, one of which was the repair of bridges, and that was before any county rate was directed to be made by any Act of Parliament. And whether these duties arose by the common law, or were imposed by any statute, it was at the same time implied that those who imputed any neglect to a county might do so without any foundation; in which case the county must necessarily have had the power of defending themselves. Trials of this kind have been frequently had, and even disputes between two counties, which could not have been conducted without great expense; that expense has always been

[*594]

† Although the order does not state on what account that fine had been imposed, yet it was agreed, that the question should be argued and

determined as if it were expressed in the order that the fine was imposed on the account above-mentioned.

1792.
THE KING
v.
The Inhabi-
tants of
ESSEX.

borne by the county, and taken out of the county stock ; and yet there is no Act of Parliament to enable the county to do so, but it is founded on long usage and the necessity of the thing. I am not driven, nor will I ever resort to the maxim, *communis error facit jus* ; but uniform and unbroken usage *facit jus*. This is that which makes the common law : it is not to be found in the statute-book, but in the text-books, which treat on it as the common law of the land. There is another class of cases analogous to the present ; the costs of defending appeals against orders of removals. The stat. 48 Eliz. c. 2, s. 1, gave power to the parish officers to raise a parish stock ; and when a subsequent statute, 13 & 14 Car. II. raised the questions of settlements, it became necessary to have recourse to some fund for defraying the expenses of litigating them ; and those expenses have always been paid by the parish officers out of the parish stock. The proposition therefore on which I rely is this : That wherever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence over the county purse, have necessarily a right to defray such expenses out of the county stock.

ASHHURST, J. :

Where magistrates have acted *bonâ fide* for the interest of the county over which they preside, in opposing the levying of a fine which (as they think) has been improperly imposed, they ought not in reason to be burthened individually with the expenses attending it. And if any authority can be found, either of the same kind, or by analogy to similar cases, it ought to be adopted in this case. Now the instance (mentioned by my Lord) of defending appeals seem strong in point. The *statute of Elizabeth directs the overseers to provide a stock for the relief of the poor of the parish, the putting out of parish apprentices, "and to do and execute all other things, as well for the disposing of the said stock, as otherwise concerning the premises, as to them shall seem convenient." It might therefore be argued, that the stock should not be applied to any other purposes than those specifically mentioned : but a subsequent statute having directed the removal

[*595]

of paupers, and the expenses of litigating the questions of settlement being a consequence upon such removal, it has been the constant practice to allow these expenses to be defrayed out of the parish stock ; the legality of which has never been disputed. So, in this case, the Act of Parliament having directed a county stock to be raised, and to be applied to certain purposes therein mentioned, and to others "to which the public stock of any county is applicable by law," reason and analogous cases warrant us in saying, that the expenses of litigating the legality of the fine imposed upon the county, ought to be defrayed out of the county stock.

1792.
THE KING
v.
The Inhabitants of
Essex.

BULLER, J. :

Whether this case be considered on the principles of the common law, on the authority of analogous cases, or on the words of the statute itself, I am of opinion that the order of Sessions may be supported. The case of bridges bears so strong an analogy to the present, that on principle it is not to be distinguished from it ; and that, it is to be remembered, was a case well established before the statute 12 Geo. II. Then, if at that time all the expenses incurred in litigating questions between two counties, should be borne by the respective counties, and paid out of their county stocks, let us see how the question stands since that Act. That statute, after reciting two former Acts respecting the repair of county bridges and highways, and other statutes respecting gaols and other different objects, for each of which a separate rate was to be raised, directs one general rate to be made for the purposes of those Acts, and for other purposes to which by law it is applicable. Now, if before that Act the county were liable to pay the expenses of litigating questions respecting the repairs of bridges and highways, it must still continue liable, notwithstanding the words of the Act are confined merely to repairs ; and if this be the true construction of the statute with regard to bridges and highways, we cannot put a narrower construction on it as to county gaols. In my opinion, the true construction of this Act is, that the necessary expenses of every thing relating to the subjects therein mentioned, *must be borne by the county, and paid out of the county stock. If it

[*596]

1792.
THE KING
v.
The Inhabi-
tants of
ESSEX.

were otherwise, the active magistrates of a county would be put in a perilous situation, in a variety of cases that might happen. For instance; the justices of the peace have, under one of the Acts,* power to purchase land adjoining to county bridges: now, if the words of the statute be taken strictly, they would be confined to the sum contracted for with the seller; but the purchase cannot be completed without some other contingent expenses, taking an abstract of the title, drawing the conveyance, &c. which must therefore necessarily be included in the Act. To go a step further; objections may be made to the title after the contract is entered into, and a suit may be instituted against the magistrates who contracted, to compel them to carry the agreement into execution; it would be absurd to say, that those who have contracted on behalf of the county should not be defended, at the expense of the county, against such a suit. It seems, therefore, that the necessary expenses attending all those subjects mentioned in the Act, must be paid out of the county stock; and that is sufficient for the determination of this case. But, even upon more general grounds, when a county is attacked, they should have the power of defending themselves, if unjustly attacked; and whether or not there be just grounds on which they may defend themselves, it must, according to reason, the words of the statute, and by necessary implication, be determined by the justices acting at the Sessions, in whose hands the distribution of the county rate is vested.

GROSE, J., declared himself of the same opinion.

Order of Sessions affirmed.†

* 14 Geo. II. c. 33, s. 1.

† This case is cited in the judgment, and the principle followed in

Reg. v. White (1884), 14 Q. B. D. 358, 54 L. J. M. C. 23.—R. C.

DOE ON THE SEVERAL DEMISES OF TURNER AND WIFE,
AND WARD *v.* KETT.

(4 T. R. 601—605.)

1792.
May 4.

[601]

A. devised to B. and the heirs of her body and for default of such issue, then over; B. died in the lifetime of A. and then A. by a codicil confirmed his will; held, that the heir of B. took nothing, though it appeared that A. knew of the death of B. and of the birth of her son, before he made the codicil.*

THIS was a special case, reserved at the trial of an ejectment, brought to recover an estate in Suffolk. N. Goddard, by will dated 17th November, 1758, devised to his grand-daughter Elizabeth Foldsom and the heirs of her body lawfully to be begotten, and for default of such issue to E. the wife of J. Ward, for life; and after her decease to the three eldest children of E. Ward, or such of them as should be living at the time of her decease, and to their heirs, as tenants in common. * * * After the making of the will, E. Foldsom married J. Kett; and in December, 1760, in the lifetime of the deviser, died, leaving a son, the present defendant. The deviser knew of the birth of the defendant, and of the death of his mother, immediately after those events happened. In October, 1762, the deviser made a codicil to his will, attested by three witnesses; in which he recited, that in his will he had appointed one S. G. one of his executors, which he wished to revoke; and then he appointed N. G. in his stead: and after giving the new executor a small legacy, he concluded thus: "And I do hereby declare, That my said will in writing, bearing date, &c.; and this codicil, which I will shall be added to and deemed part thereof, do contain my last will and testament." In October, 1768, the deviser died; since which time the defendant has been in possession. [The lessors of the plaintiff deduced their title from the children of E. Ward under the gift over. The case having been argued:]

LORD KENTON, Ch. J. :

[602]

Nothing can be better established than that if there be a devise

* The result in this particular case (the devisee having been a grand-child of the testatrix), would have been different under the Wills Act

(1 Vict. c. 26, s. 23), but this does not affect the principle of the decision.—
R. C.

1792.
DOE
v.
KETT.

to A. and his heirs, or to the heirs of his body, or to A. in tail, and A. die in the lifetime of the devisor, the devise is void. It has been thus settled in all the cases from *Brett v. Rigden* to *Ambrose v. Hodgson*,† and *Warner v. White*;‡ and indeed the case of *Ambrose v. Hodgson* was carried up to the House of Lords, not on account of doubts entertained by any lawyers concerning the determination of this Court, or of the Court of Chancery; but merely to satisfy the anxiety of the parties themselves. Now, in this case, consider what was the intention of the devisor? He devised to E. Foldsom and the heirs of her body. She therefore must have taken as a purchaser; and would, in the event of her surviving the devisor, have had the power of suffering a recovery, and her children must have taken by descent: whereas this is an attempt, on the part of the defendant, to make them take as purchasers, which would alter the course of descent. Then it has been argued, That this differs from the former cases cited, on account of the proviso which was inserted in the will, to prevent *the tenants in tail suffering a recovery; but that was an impotent attempt by the devisor; for it is not permitted to a party to give an estate to another, and deprive that other of the legal consequences annexed to it. With regard to the codicil, it would operate as a republication of the will for many purposes; such as that of passing lands purchased after making the will, but not so as to alter the will. Now, supposing the devisor had by his will given an estate in tail to E. Foldsom, and had, after E. Foldsom's death, republished it by a codicil, that would not have altered the meaning of the words in the will; and the words here used are equivalent to those. If this codicil were sufficient to pass the estate to the representatives of E. Foldsom, there never would be a lapsed legacy when there was a republication of the will, but it would always go in favour of the executors of the legatee deceased.

[*604]

ASHHURST, J. of the same opinion.

BULLER, J. :

It is admitted that a republication can have no other effect than to let the will stand as if it were made at that time. Then

† Dougl. 337, 3rd ed.

‡ *Ibid.* 344, n. 4, and 1 Bro. Ch. Ca. 219, n.

if this will be read as dated at the time of the codicil, it purports to convey an estate-tail to a dead person, which is a void devise; for nothing is given by the will to the heirs of E. Foldsom, but to E. Foldsom herself. Then consider the effect of the circumstances stated in the case, that the deviser knew of the death of his granddaughter when he made his codicil. Supposing, in the first place, that he had not known of it, the devise would have been void; therefore, the mere circumstance of her being dead would not alone vary the case. Neither can it be material that he did know of it; because if that were to make any difference, it would be saying that something, not apparent on the face of the will, should vary the construction of that which appeared on the will itself.†

1792.
DOR
C.
KETT.

GROSE, J. :

It is unnecessary to add to what has been already said by the Court; and I will only refer to the words of Lord Ch. J. PARKER, in *Goodright v. Wright*, where, after stating the case and the judgment of the principal point, he says,† “And thus has the law been long clearly settled as to this point, ever since *Brett* and *Rigden’s* case; but on this occasion I have been the larger in delivering the judgment of the Court, because of some late endeavours to invalidate this rule, which, by the way, *may make it proper to observe, that the altering settled rules concerning property, is the most dangerous way of removing land-marks.”

[*605]

ROE *d.* JAMES *v.* AVIS AND OTHERS.

(4 T. R. 605—607.)

1792.
May 4.

Under a devise “to A. and B. and their heirs, and in case they agreed to sell the estate, that they should have their equal shares of the money arising therefrom; but if they agreed to keep the estate whole together, then that the rents should be equally paid and divided between them, and to the several and respective heirs of their bodies.” A. and B. took only estates tail.

[605]

On the trial of this ejectment, at the last summer assizes at Hertford, before Gould, J. a special case was reserved for the

† In *Stead v. Berrier*, Sir T. RAYMOND said, “Constructions of wills ought to be collected out of the

words, and not dehors, or by averment, as 5 Co. 68, *Chenye’s* case.”

† 1 P. Wms. 399.

1792.
ROE
v.
AVIS.

opinion of the Court. The material facts in this case were these : —J. Beech, being seised in fee of the premises in question, devised to his wife for life, and after her decease “to be equally divided between his four children, Henry, John, Elizabeth, and Sarah, and to each of them and their heirs for ever, share and share alike ; and in case they should be minded and agree among themselves to sell the said estate, then every one of his said children should have their equal shares of monies from thence arising ; but if they consented and agreed to keep the estate whole together, then and in such case all the rents, issues, and profits thereof, from time to time, as they should become due and payable, should be equally paid and divided between his four children, and to the several and respective heirs of them on their bodies lawfully begotten, share and share alike.”

[The principal question* was, Whether the four children of J. Beech, the first devisor, took estates in fee or in tail under his will ? It was argued for the defendants, That they took a fee under the words of his will, which gave them a power of selling.]

[607]

The COURT said [on this point] : That the children of J. Beech (the common ancestor) took only estates tail in the respective fourths ; for though it was given to them and their heirs, and they had also a power of selling the estate, by the former part of the devise, yet the subsequent words “to the several and respective heirs of them on their bodies lawfully begotten,” restrained the operation of the former words, and reduced the estate devised to an estate tail. * * *

* There was a second question in the case ; but on that the decision is considered to have been overruled. Jarman (3rd ed.), p. 627.

FARR AND OTHERS v. NEWMAN AND ANOTHER.

(4 T. R. 621—651.)

1792.
May 14.

[621

Goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right.

THIS was an action upon the case, against the defendants, as sheriff of Middlesex, for making a false return to a writ of *feri facias*. The declaration stated, that the plaintiffs in Easter 30 Geo. III., recovered a judgment in this Court against T. Watts, and A. Reid and Ann his wife; which said T. Watts and Ann Reid were the executor and executrix of W. Lewer, deceased, for 236*l.* 10*s.* to be levied of the goods and chattels which were of W. Lewer at the time of his death in the hands of Watts and Ann Reid, to be administered, if they had so much of the goods and chattels of W. Lewer to be administered; and if they had not, then the sum of 32*l.* 10*s.* parcel of the damages, being for the costs, &c. to be levied of the proper goods and chattels of A. Reid and Ann his wife. That before the issuing of the writ after-mentioned the plaintiffs obtained satisfaction of a part of the damages so recovered; but at the time *of issuing the writ, there remained 114*l.* 12*s.* due to them. That for the obtaining of the said 114*l.* 12*s.* the plaintiffs on the 17th of May in the 30th year, &c. sued out a *feri facias* directed to the sheriff, by which he was commanded to levy 114*l.* 12*s.* of the goods which were of the said W. Lewer at the time of his death in the hands of the said A. Reid and Ann his wife to be administered; and if she had not so much thereof in her hands, then to levy 32*l.* 12*s.* (being the costs, &c.) of the goods of the said A. Reid and Ann his wife. That that writ afterwards, and before the return of it, on the 28th of May, 1790, was delivered to the defendants to be executed; by virtue whereof the defendants on the day last-mentioned seized the goods which were of W. Lewer at the time of his death in the hands of A. Reid and Ann his wife to be administered, to the value of the residue of the damages so recovered, &c. and then and there sold the same, and thereof levied the residue of the said damages so recovered; yet that the defendants falsely and deceitfully returned on the said writ that

[*622]

1792.

FARR

v.

NEWMAN.

there were not any goods in their bailiwick which were of W. Lewer at the time of his death in the hands of A. Reid and Ann his wife to be administered, whereof they could cause to be levied the said damages, &c. and that A. Reid and Ann his wife had not any proper goods or chattels in the defendant's bailiwick, whereof they could cause to be levied the costs, &c.

The defendants pleaded the general issue. At the trial at Westminster before Lord Kenyon, the jury found a special † verdict (in substance) as follows :

That the plaintiffs in Easter Term 30 Geo. III., recovered a judgment against T. Watts and A. Reid and Ann his wife, as executors of W. Lewer, for 286*l.* 10*s.* as stated in the declaration. That part of it was afterwards paid to them ; and that for the residue 114*l.* 12*s.* they sued out a *fiery facias*, as stated also in the declaration : which was delivered to the defendants, as sheriff, on the 28th of May, 1790, to be executed. That in Easter Term, 1790, one William Wilson recovered a judgment in this Court against Alexander Reid for 1,047*l.* debt, and also 63*s.* for his damages and costs ; which judgment was signed on the 27th of May, 1790. That on the 28th of May, 1790, Wilson sued out of this Court a certain writ, bearing *teste* the 17th of May, 1790, upon the last-mentioned judgment, directed to the *then sheriff of Middlesex ; by which writ the sheriff was commanded to levy of the goods and chattels which were of the said Alexander Reid in his the said sheriff's bailiwick, 1,047*l.* which William Wilson lately recovered against Alexander Reid for a debt, and also 63*s.* for damages and costs, &c. That the last writ was also returnable on Friday next after the Morrow of the Holy Trinity, and was indorsed to levy 552*l.* 14*s.* 6*d.*, besides sheriff's poundage, officers' fees, and costs of levying. That the last-mentioned writ was afterwards on the same 28th of May, 1790 (being before the return thereof) and a few hours before the delivery of the said writ of the plaintiffs to the sheriff as aforesaid, delivered to the defendants, then sheriff of Middlesex, to be executed. " That the defendants, as sheriff on the day and year last mentioned (a

[*623]

† At first only a special case was found ; but a second trial was directed by the Court for the purpose of inquiring whether there were any fraud.

few hours before the delivery of the said writ of the plaintiffs for the purpose aforesaid) by virtue or under colour of the said writ, at the suit of William Wilson at Westminster aforesaid, in the said sheriff's bailiwick, seized certain goods and chattels, to the value of 200*l.* then being in a certain house wherein Alexander Reid and Ann his wife then resided, and in which house W. Lewer before and at the time of his death resided; and which said goods and chattels were the goods and chattels of W. Lewer deceased, at the time of his death, and were in the hands of the said Alexander Reid and Ann his wife." That on the said 28th day of May, 1790, at Westminster aforesaid, after the said sheriff had so seized the said goods and chattels, the within mentioned C. G. G. the plaintiff's attorney, gave notice in writing to Wilson's attorney, and to the defendants, " that the said goods and chattels so seized were the goods and chattels of W. Lewer deceased at the time of his death, and not the goods of Alexander Reid; and that Ann Reid, the wife of Alexander Reid, was executrix, and T. Watts executor, of W. Lewer, and had proved his will; that Alexander Reid and Ann his wife were in possession of the same, and that the same were assets in their hands for the payment of the debts of W. Lewer; that such assets were liable for the payment of the aforesaid sum of 114*l.* 12*s.* recovered by the plaintiffs; and also that such assets were liable to the payment of a sum of 116*l.* 10*s.* 4*d.* recovered against the same parties as executors in the said Court of King's Bench of Easter Term then last, by F. Stedman: that such assets were not liable to the payment of any debts of Alexander Reid, the same not being sufficient to satisfy the said judgments, and other the just debts of W. Lewer; *and further, that he C. G. G. as attorney for the respective plaintiffs meant to take out, and was about taking out, executions upon the judgments aforesaid, to levy the goods aforesaid, being such assets; and that unless they immediately quitted possession, one or more actions would be brought against them." That the said C. G. G. as attorney for the plaintiffs, soon afterwards, on the said 28th of May, 1790, procured a warrant from the defendants, dated the day and year last aforesaid, on the within mentioned writ of execution at the suit of the plaintiffs, which had been delivered to the sheriff to be executed, directed to P. Cawdron, an

1792.
FARR
P.
NEWMAN.

[*624]

1792.
 FARR
 v.
 NEWMAN.

officer of the defendants, whereby the said sheriff commanded P. Cawdron to levy 114*l.* &c. pursuant to the directions of the writ, &c.: That P. Cawdron, the officer, went with the said warrant into the aforesaid house, where the goods and chattels so seized as aforesaid were before the said goods and chattels, or any part thereof, were sold or removed out of the said house, and there saw the same; but did not levy thereon. "That the goods so seized were of the value of 200*l.*; and that the same had been, and were at the time of the death of W. Lewer, his property; and that his widow Ann Lewer took possession of the house and effects as executrix of his last will and testament: that whilst she was so possessed thereof, she intermarried with the said Alexander Reid; and that they, after such intermarriage, continued in possession of the said house, goods, and chattels, till the said sheriff so seized the said goods and chattels: That the said goods and chattels remained in the house aforesaid, possessed by the testator W. Lewer, at the time of his death; and that under the said writ of execution, the same were seized for the proper debt of the said A. Reid:" That the defendants, being sheriff at the time of the return of the writ within mentioned, at the suit of the plaintiffs, did not cause to be levied the said 114*l.* 12*s.* or any part thereof, nor had they or either of them, at the return of the said writ, the said 114*l.* 12*s.* or any part thereof, &c.; nor have they, nor hath either of them, paid to the plaintiffs, or to any or either of them, the said residue of the said damages, &c.: and that the defendants, at the return of the writ, returned on the said writ in manner and form as by the plaintiffs is within in that behalf alleged. By means of which said premises, the plaintiffs are and have been greatly retarded and hindered from obtaining of the said residue of their damages, &c. recovered, &c. But whether upon the whole, &c.

[625]

This special verdict was twice argued; the first time in Trinity Term, 1791, by *Morgan* for the plaintiffs, and *Wood* for the defendants; the second in Michaelmas Term last, by *Bearcroft* for the plaintiffs, and *Erskine* for the defendants.

For the plaintiffs two points were made; 1st, That the tes-

tator's goods could not be taken under an execution for a debt of the executor's; to prove which were cited *Crane v. Drake*, 2 Vern. 616, 1 Eq. Cas. Abr. 240; *Ellis's case*, 1 Atk. 101; 3 Burr. 1369; and 1 Com. Dig. 259: 2ndly, That they could not be taken for the debt of the husband of the executrix; Bro. Abr. title "Baron and Feme," pl. 84, *ib.* title "Administrator," pl. 38. *Norton v. Sprigg*, 1 Vern. 309; *Bachelor v. Bean*, 2 Vern. 61; 1 Com. Dig. 169; Wentw. Off. Exec. 298; and 1 Com. Dig. 570.

1792.
FARR
v.
NEWMAN.

In answer to the first, the following cases were relied on by the defendants' counsel:—*Hoyle v. London*, 3 Keb. 889; *Elliot v. Merryman*, 3 Barnard, 81; *Nugent v. Gifford*, 1 Atk. 463; *Russell's case*, 5 Rep. 27; 2 Vez. 268; and *Whale v. Booth*.*

And in answer to the second, these two:—*Arnold v. Bidgood*, Cro. Jac. 318; *Thrustout v. Coppin*, 3 Wils. 277; and 2 Bl. Rep. 801.

[626]

[The COURT took time to consider their judgment; and ultimately it appeared that there was a difference of opinion on the Bench, Lord KENYON, C. J., ASHHURST, J., and GROSE, J. being in favour of the plaintiff and against the right of the execution creditor; and BULLER, J. being of the contrary opinion. The opinion of the majority has now so long been considered and treated as settled law, that it seems unnecessary to set out all these judgments. That of GROSE, J. as the most carefully reasoned judgment, may be taken as fairly representing the opinion of the majority.]

* *Whale v. Sir Charles Booth, Knight*, M. 25 Geo. III. B. R. [A note of the case is furnished with the report of the principal case in 4 T. R. 621, 625. In *Whale v. Booth* the goods of the testator had been sold under a *fieri facias* against the executor for his own debt, and the executor had joined in a bill of sale. Lord MANSFIELD held that the effects had been completely alienated; and this, although the purchaser as well as the execution creditor had notice

that the effects were assets of the testator.]

After the comments made on Lord MANSFIELD's judgment, not only in the principal case above, but also by Lord ELDON in *McLeod v. Drummond*, 17 Ves. 152, 154 *et seq.* 168 *et seq.*, by Sir T. PLUMER in *Ray v. Ray*, Coop. 267, and by EYRE, C.J., in *Quick v. Staines*, 1 Bos. & Pul. 295, that judgment cannot now be regarded as an authority for any general proposition.—R. C.

1792.

GROSE, J. :

FARR
v.
NEWMAN.
[626]

The question upon all these counts is, Whether the defendants as sheriff have made a false return to the plaintiffs' writ ? that is, Whether there were any goods of the testator in the hands of Reid and his wife to be administered at the time the sheriffs received the plaintiffs' writ of *feri facias* ? The material facts on which this question arises are few ; William Lewer, the testator, died indebted to the plaintiffs in a sum which, with the costs of recovering that sum, amounted to 236*l.* 10*s.* ; leaving Watts executor, and the widow of the testator executrix. Of this sum 114*l.* 12*s.* was due when the *feri facias* issued. Goods to the value of 200*l.* came into the hands of the executrix, who intermarried with Reid. After the marriage, on the 28th May, 1790, a writ of *feri facias* against the goods of A. Reid at the suit of W. Wilson, commanding the sheriff to levy 552*l.* 14*s.* 6*d.* was delivered to the defendants. On the same day, and after the delivery of that writ, a writ of *feri facias*, at the suit of the plaintiffs, was delivered to the defendants, commanding them to levy 114*l.* 12*s.* of the goods and chattels of W. Lewer deceased, at the time of his death in the hands of Reid and his wife to be administered, if there were so much, if not 32*l.* costs of the goods of the husband and wife as executrix. Whether there were any goods of Reid, which had not been the goods of the testator does not appear : but it does appear that on the 28th of May, 1790, when the first *feri facias* was delivered to the sheriffs, there were in the hands of Reid and his wife goods which had been the goods of the testator. It is not stated that those goods had been in any way appropriated by Reid or his wife, or that

[*627] *either of them had paid debts of the testator, which they claimed to be reimbursed by the produce of these goods. If these goods were in law bound by the delivery to the defendants of the writ against the goods of Reid, the return is not false : but if they were not so bound, it was a false return.

Before I consider the law, I will say a word upon the justice of the case ; and I think no man can pause a moment upon it. Goods are delivered by the law into the hands of a man for the purpose of dividing them amongst his creditors, legatees, and next of kin, of another, whose goods they were. Their value we

will suppose 1,000*l.* The debts and legacies we will suppose 500*l.* On the day those goods are delivered to the executor, before the testator's creditors can recover their debts, a *feri facias* for 2,000*l.* against his goods is delivered to the sheriff. It is urged that these goods, the moment the writ is delivered, are bound to pay the debt of the executor, and that neither the creditors, nor legatees, nor next of kin, shall receive one farthing. The injustice is obvious. It is to make the goods of A. pay the debts of B. ; and possibly leave the creditors of A. without any redress but against the person of B. One case of intolerable hardship may be put :—Suppose the executor indebted to the Crown more than the value of his own and the testator's personal estate : the moment the executor is invested with his authority an extent issues and sweeps away every shilling of the testator, in fraud of his creditors, legatees, and next of kin !—a more shameful act of injustice can hardly exist under the name of law. I hope I can shew it to be no more law than it is justice. The ground on which it was and must be argued, is, That the *feri facias* against the goods of the executor must be executed on the goods of the testator in the hands of the executor ; and here I premise that (for argument's sake) I shall consider Reid, the husband of the executrix, as if he were the executor ; and it is argued that the moment a man becomes executor, the goods of the testator are so vested in him that they are liable to his debts as much and in the same way as his own proper goods are : in short, that in the hands of the executor they are to be considered in all respects as his goods, at least as far as concerns executions against him. In order to see whether that position be well founded, I will consider what in law an executor is, and what interest he has in the testator's goods. One definition (and I think a good definition it is) that I find of an executor is, that he is one to whom a testator has given his goods, chattels, and personal estate, *for the purpose of paying all his debts ; and in Wentworth's Office of Executors, p. 4, it is said, that "The naming of A. and B. executors is by implication a gift or donation unto them of all the goods and chattels, credits and personal estate of the testator ; and the laying upon them an obligation to pay all his debts, and making them subject to every man's action for the

1792.
FARR
v.
NEWMAN.

1792.

FARR
v.
NEWMAN.

same ;" and this, that is, the payment of his debts, being the purpose for which the goods are given, his interest in the goods is not the same as in his own goods : the reason given is, that he hath them not in his own right, but in the right of another ; and that " by law he is but the minister and dispenser and distributor of these goods." 9 Rep. 88*b*, Wentw. 88. That of this there can be no doubt, we need but look into the entries of judgments against executors, and the writs of execution upon those judgments, which are to levy so much of the goods of the testator in his hands to be administered. This shews that the law considers those goods differently from his own goods : it is not to levy so much of his goods, which it would have been, if upon their coming into his hands the law had considered them as his,—but it is to levy of the goods of the testator, considering them, in his hands, still as the testator's. If they are not so to be considered, but as the goods of the executor, it seems that the writ of *fieri facias*, &c. *de bonis testatoris* cannot be executed : but inasmuch as they are in law the testator's, he (the executor) cannot devise them. If he die intestate, the goods of the testator vest, not in his administrator, but in the administrator *de bonis non* of the testator : if he commit felony or treason, although he forfeit his own goods, yet those which he has as executor are not forfeited ; for the law, and for the principle upon which the law is founded, I cannot do better than refer to Wentworth's Office of Executors, pp. 85, 86, 87, 88 ; and there we find (p. 86) a passage directly applicable to the point now before us : " Whereas a man's goods stand liable to the payment of his debts, both in his lifetime and after, the goods which a man hath as executor are not to be taken in execution for his own debts, either upon a recognisance, statute, or judgment, had against him ; and if such an one die indebted, leaving to his executors much goods which he had as executor, these are not assets in his hands, liable to the payment of his debts, but only for the payment of the first testator's debts or legacies. Therefore a *quo minus* brought by an executor, shewing that he was not able to pay the king's debt, because the defendant detained from him 100*l*. which he owed *him as executor to F. S. was overthrown ; for that it could not be intended, saith the

[*629]

book, that the king's debt could be satisfied with that which the plaintiff should recover and receive as executor." And the reason of this difference is stated in page 88. The passage in page 86 is direct; and what the author states to be law appears to be founded on passages in the Year Books, in Plowden and in Lord Coke; and appears to have been adopted by Lord Chief Baron Comyns, in his Digest, 1 vol. 259 (B. 10) tit. Administrator. His words are, "Nor shall they be taken in execution for the proper debt of the executor or administrator." Upon the same principle we find in 3 Burr. 1369, that the commissioners of a bankrupt cannot seize the testator's goods in the hands of an executor-bankrupt: but a commission of bankrupt is considered as a statutable execution: and if in law the goods are his goods, they vest in the commissioners, and they are bound to take them. Such being the undoubted law, as to some of the points I have taken notice of, one may fairly be permitted to ask, Why may not the executor devise the testator's goods? Why may not his administrator take them? Why are they not forfeited to the Crown on the attainder? Why are they not liable to be seized under a commission of bankrupt against the executor? The answer and reason is, I think, obvious. It is because they are not his goods: he is only the distributor and dispenser of them for the benefit of the creditors, the legatees, and the next of kin of the testator. To permit him to devise them, to permit his administrator to take them, to permit the assignees, under a commission against the executor, to seize them, and to permit the sheriff, under an execution issued against his goods, to take them, would be to dispose of them for purposes for which he had them not, in a way in which it cannot by law be intended that those purposes will be answered: and it seems very difficult to assign any reason why the goods of a testator in the hands of an executor, should be privileged from a seizure by the Crown in the case of an attainder of felony, and from a seizure by assignees under a commission, and yet not be privileged from being taken by the sheriff under a *fieri facias* against the executor's goods. On the part of the defendants it has been contended, That if in this case the goods are not considered as the goods of Reid, the husband of the executrix, the doctrine laid down in former cases, in which

1792.

FARR

v.

NEWMAN.

1792.
FARR
v.
NEWMAN.
[*630]

the executor has been considered as empowered to dispose of the goods of the testator, will be impeached ; and it has been argued, That this case is analogous *to those cases. There I conceive is the fallacy ; and that in the two cases there exists a manifest and material difference ; and that the determination in this case for the plaintiffs, will not at all impeach the law upon which that line of cases is founded. The power of selling or disposing of the goods of the testator the executor must have : it is necessarily incident to his office : without that power his trust cannot be executed ; nor can the purposes for which it is given be answered. Therefore, when he sells, the law intends that he sells the goods of the testator to answer the purposes for which the power of selling was given : and in so doing he does that which is necessary to his authority, and therefore lawful, just, and right. But in the case before us, it is the reverse : it is not necessary for the purpose of discharging the testator's debts, and executing the executor's authority, that the goods of the testator in the hands of the executor should be considered as the goods of the executor, and taken in execution under a judgment to recover a debt due from him. On the contrary, the moment they are taken under this judgment, the power of distributing them for the purposes for which they were given is taken away ; and so far is it untrue, that it can be intended that thereby the testator's debts may be paid ; that it is most evidently clear that, if suffered, it prevents the possibility of their being paid by the produce of those goods : and the power of distributing them in the way intended by the testator is taken away (and as it is said by law) ; and so, if it be true, a man is by law compelled to be unjust : for when they are taken in execution for the executor's debt, they are put into another channel : they are applied to a purpose for which they were not given ; and the power of doing justice in this respect is taken from the executor, even if he intend to do it. Surely, it cannot be the operation of law to work such absurdity and injustice under the plea of necessity, which clearly does not exist. But cases have been cited, and it was argued for the defendants, That to this purpose is the case in 3 Keb. 899, *Hoyle v. Landon* : That was a "motion to stay execution of goods in the sheriff's hands, being the wife's,

1792.
 FARR
 v.
 NEWMAN.

as executrix to her former husband, and taken for the present husband's debt; which RAINSFORD, Ch. J. and JONES, J. denied; because by payment of the debts of the former husband, these goods may be the wife's own; and this Court will not try this on affidavit. And by RAINSFORD, Ch. J. in *Norden's* case, *supra*, last term, it was held, that execution against the goods of the executor for debt *in jure proprio* is a *devastavit* "**nolens volens*." The observations upon this case are, first, That whatever was determined was on a summary motion, and by the opinion of two judges only; and, 2ndly, That the ground was that the goods might be the wife's own, by having paid debts of the former husband. Therefore it may be fairly inferred that, unless, by something done by the executrix they become hers, they are to be considered as the goods of the testator. Here nothing appears to have been done; and no fact is stated to shew that, by the payment of a debt, or anything else, they had become the wife's or her second husband's. But whether the wife's own or not, the Court would not in that case determine on affidavit. This, therefore, they considered as a matter of fact: and here they are not stated to be her's; nor anything done by her to give her a claim to them; and then the CHIEF JUSTICE alluded to a case which, in the report, is said to be "*supra* last term;" but it is not to be found; and by which a man is guilty of a *devastavit nolens volens*. That the law will consider a man guilty of doing that which is unjust and unlawful as to third persons, and which the law says must be done, and that it is not in his power to prevent, seems most extraordinary, and appears to be the strongest of all reasons for saying that that case, if even there were such an one, cannot be law. I have looked in the preceding term for such a case: there is none there; nor is there in Levinz; but in Sir T. Jones, 88, there is reported, as of that term, a determination of a case of *Norden v. Levet*;† but in Levinz and Keble the determination is stated as of Trinity Term, 29 Car. II. That case was in error on a *scire facias* against an administrator, suggesting a *devastavit*. In that case, the administrator, having brought an action of trover in right of the

[*631]

† See this case also in 3 Keble, the term but one before *Hoyle v. 778*, reported as of Tr. 29 Car. II. *Lundon*.

1792.

FARR

v.

NEWMAN.

[*632]

intestate, compounded it by an agreement, that the administrator should discharge the defendant in the action of trover; and that the defendant should pay the administrator 650*l.* at a future day. The question was, Whether this was a *devastavit*? and, Whether he should be liable upon this *de bonis propriis*? It came on several times; and at last it was determined, that this was a disposal and conversion to the use of the administrator; and judgment was given for the plaintiff. From the name, the subject, and the time of the determination, I rather think this was the case alluded to by the CHIEF JUSTICE, and certainly misapplied by him. The motion in the case cited was the first day of Hilary Term, 1677; and *only Raynsford, Ch. J. and Jones, J. were in Court. The case of *Nugent v. Gifford*, 1 Atk. 468, proves only that an executor may assign over a mortgage term of his testator; and if he do so, although in payment of his own debt, such assignment is good; and that is founded on the doctrine that an executor may alien the assets of the testator, and when aliened no creditor can follow them; which I admit and say it does not apply to this case; for although he may alien as the distributor of the goods, yet to every other purpose they are the goods of the testator, and so to be considered; and not his goods. The same observation and answer apply to *Jacomb v. Harwood*, 2 Vez. 265; and that case, as far as concerns this cause, proves only that where there are two executors, each may release, pay, transfer, or sell, without the other, any part of the testator's property; which I do not deny. In *Whale v. Booth*, Lord MANSFIELD said, "The general rule both of law and equity is now clear, that an executor may dispose of the assets; and they cannot be followed by the creditors of the testator. *Mead v. Ld. Orrery*, 2 Vern. 75; 2 Eq. Cas. Abr. 488. And it would be very inconvenient if the creditors could; for then no one would deal with an executor without examining the whole account of assets. Where the buyer is any way accessory to the contrivance of a *devastavit*, that is a different case; but here it is not suggested; there is no appearance of fraud. The executor might have disputed the first execution; but he consented to it: and I do not see how it then differs from any other alienation. An execution acquiesced under, is equivalent to a

1792.
 FARR
 v.
 NEWMAN.

conveyance." Then the ground of that determination was, that under all the circumstances of that case, the execution was to be considered as a sale by the executor. If that were the ground, I have given it my answer, as not applicable to the present case: if it were upon the ground contended for in the present case, I say that this special verdict was made for the purpose of reconsidering that case; and reasonably too, when it is recollected that that ground is totally destructive of the purpose for which the power of the executor is given. But it is said, If this be not the law, no man can safely deal with an executor. That I deny; for a determination in this case for the plaintiffs will not decide that a man may not buy the testator's goods, if the executor choose to sell them. It will only decide that a judgment against the executor's goods does not necessarily bind the goods of another person, who gave them to the executor to *discharge his (the testator's) debts, and not the debts of the executor. And if it be said that the executor may with this money pay his own debts, and so elude the testator's intention, my answer is, I admit it: It is so, because (as I said before) the power of sale is necessarily incident to his office, and the law intends that he will do what is right; but in considering the goods of the testator as necessarily liable to the execution of a judgment against the executor, the law would compel injustice to be done, and consider the act as unjust, as it considers the execution which it compels, and which the executor cannot prevent, as a *derastavit* by him. A question may be put, How the sheriff is to distinguish between the goods of the executor and the goods of the testator? Here that question cannot be put; because the sheriffs were informed and had notice that these goods were the goods of the testator, and not the goods of the executor. But I will meet the objection in its full force. The sheriff in this, as in many other cases, must act at his peril: so say Dalton, 146, and Gilbert, in his Treatise on Execution, p. 21. Dalton, 146, in inquiring into the duty of a sheriff, where there is a doubt respecting the property of the goods, says, "But the safest and wisest course for the sheriff or officer is, to inquire by a jury in whom the property of the goods is; or else not to take in execution, or not to meddle at all with any such goods as

[*633]

1792.

FARR

v.

NEWMAN.

shall not plainly appear to them to be the proper goods of the defendant; for it seemeth that the officer is bound at his peril to take knowledge whose the goods be, or at least that they be the proper goods of the defendant: but being found by the jury, that excuseth the sheriff." Gilbert, 21, says, "The sheriff is bound, at his peril, to take only the goods of the defendant; and if he doubt whether the goods shewn him be the defendant's, he may summon a jury *de bene esse*, to satisfy himself whether the goods belong to the defendant or not. This will justify him in returning, that the defendant has no goods within his bailiwick; and mitigate damages in an action of trespass, if the goods seized should not happen to be the defendant's." If this would be a sufficient answer in the mouth of the sheriff, what are we to say to cases of a much severer line of justice,—cases, where a sheriff is considered as a *tort-feasor* by relation,—cases of bankruptcy? In the present case, upon information given to the sheriff that the goods were the goods of the testator, unappropriated by the executor, and on which he had no demand, he might have summoned a jury; and had the jury found them to *be the goods of the testator, not of the executor, he would have been justified in returning *nulla bona*. Upon these grounds it seems to me that the goods of the testator, upon the facts stated in this special verdict, were not in law the goods of the executor liable to an execution against him; but at the time when the *feri facias* against the goods of the testator was delivered to the sheriffs, continued and were the goods of the testator, liable to the execution against his goods; consequently that the execution delivered to the sheriffs against the goods of the executor, did not bind the goods in his hands that remained unadministered; but when they received the writ, to levy the debt of the goods of the testator, there were goods which they might have taken in execution of that writ.

[*634]

In this way of considering the question, there is no occasion for me to enter into a head of argument much discussed at the bar, how far these goods being vested in the executrix are, in consequence of the marriage, liable to be taken in execution for the debt of her husband; as, in my opinion, this action would have been maintainable had the husband been the executor, and

not merely the husband of an executrix. Nor do I consider the difference in point of law, whatever it may be in point of justice, that is made by the notice given to the sheriffs, that the goods were the testator's; because if my opinion be right, the sheriffs must, at their peril, execute the writ, and make a true return. In this case they have not so done, as they have returned *nulla bona* to the *feri facias* against the goods of the testator, when there were goods of the testator which they might have taken in execution of the writ. Therefore I am of opinion that such return being false, the action is well supported, and that the plaintiffs ought to have judgment.

1792.
FARR
v.
NEWMAN.

JENKINSON QUI TAM v. THOMAS.

(4 T. R. 665—666.)

A curate of an augmented curacy by Queen Anne's bounty, is not liable to the penalties of the 21 H. VIII. c. 13 for non-residence.

1792.
May 11.
[665]

AN action of debt for the penalty given by the 21 H. VIII. c. 13 (called the statute of non-residence), was brought against the defendant, as curate of the chapel of Stalmine, which was stated in the declaration to have been augmented by Queen Anne's bounty: and after verdict for the plaintiff, at the last assizes at Lancaster, before Buller, J. a rule was granted to shew cause why the judgment should not be arrested, on the ground that an augmented curacy was not within the operation of the statute of non-residence; against which

Law and *Chambre* now shewed cause. The statute 21 H. VIII. c. 13, s. 26, enacts, "That as well every spiritual person now being promoted to any archdeaconry, deanery, or dignity in any monastery or cathedral church, or other church, conventual or collegiate, or being beneficed* with any parsonage or vicarage,

* *Vide* 3 Burn's Ecc. Law, 262, tit. "Residence," where he takes the words to be "benefices with any

parsonage," &c. which he supposes to be a mistake either in the record or transcript, and that it ought to be

1792.

JENKINSON

v.

THOMAS.

as all and every spiritual person or persons which hereafter shall be promoted to any of the said dignities or benefices with any parsonage or vicarage, shall be personally resident, and abiding in, at, and upon, his said dignity, prebend, or benefice, &c.; otherwise he shall forfeit," &c. Now, although the only words particularly specified in the act are parsonages and vicarages, under neither of which denominations this augmented curacy falls, yet they are only put by way of example, and the act must be taken to include all benefices with cure of souls; of which parsonages and vicarages were the only denominations at the time when that act was passed. So Lord Coke,† in his comment on the statute 9 Ed. II. st. 1, c. 9, *Articuli Cleri*, says, "Rectors" are only named for example. The statute under consideration was undoubtedly intended to enforce a general regulation as to residence, which was before enjoined by the canon and common law. 2 Inst. 625. And therefore the present instance falls directly within the spirit of the regulation; and, as it was said in *Quilter v. Mussendine*,‡ this statute ought to be construed liberally to enforce residence. But if there be any doubt on this statute taken by itself, yet other statutes passed in the same *reign, and *in pari materia*, may be called in aid to the construction of it; for though, in some sense, it may be considered as a penal, yet in another and more enlarged view it is a remedial law. The statutes alluded to, namely, the 25 H. VIII. c. 16; 28 H. VIII. c. 13; and 33 H. VIII. c. 28, seem to consider the 21 H. VIII. c. 13, as extending to all benefices with cure of souls. Now, if such be the true construction of that act, this case will fall directly within the operation of it; for by 1 Geo. I. st. 2, c. 10, s. 4, all churches, curacies, or chapels, which shall be augmented, shall be perpetual cures and benefices; and by section 6, they are made subject to lapse like all other benefices: and it has been held, that *quare impedit* will lie for them. Upon the same principle it has been held, in many cases, that subject-matter newly created by statute, may be included in former statutes upon the same subject.

[*666]

"beneficed;" and it is accordingly so written in Runnington's edition of the Statutes.

† 2 Inst. 627.

‡ Gilb. Eq. Rep. 230; and 2 Eq. Cas. Ab. 73.

Cockell, Serjt. *contra*, was stopped by the Court.

1792.

JENKINSON
v.
THOMAS.

LORD KENYON, Ch. J. :

If we had the power of legislation, perhaps we should think it proper to extend the penalties created by the statute of Hen. VIII. to all benefices with cure of souls : but as it is our duty to expound, and not to make acts of parliament, we must not extend a penal law to other cases than those intended by the Legislature, even though we think they come within the mischief intended to be remedied. The words of the statute of Hen. VIII. are, "Beneficed with any parsonage or vicarage;" but this is neither a parsonage nor a vicarage. For wise purposes, augmented curacies are made perpetual cures and benefices by a subsequent statute, 1 Geo. I. in order that such curates may be perpetual corporations ; but the act does not go on to say that they shall be considered as parsonages or vicarages : if it had, the former law would have extended to them. These curates are still bound by the canon law to reside on their benefices ; but I do not think that they are liable to the penalties of the statute of Hen. VIII. for non-residence.

Per CURIAM :

Judgment arrested.

TRIPP v. FRANK.

(4 T. R. 666—668.)

1792.
May 11.

If there be an exclusive ferry from A. and B. it does not prevent persons from going by any other boat from A. directly to C., though it lie near to B., provided it be not done fraudulently, and as a pretence for avoiding the regular ferry.

THIS was an action on the case, wherein the plaintiff declared, that he was possessed of South Ferry, over the Humber ; and that the defendant wrongfully carried persons and cattle *from Kingston upon Hull to Barton, and other parts of the coast, whereby the plaintiff was injured in his right to his ferry, and lost his tolls. There was an exception stated with respect to the inhabitants of Barton : strangers who do not stay longer than

[*667]

1792.
TRIPP
v.
FRANK.

flood-tide, and market-people from the different parts of the Lincolnshire coast, passing and repassing on market and fair days in market-boats. At the trial before Buller, J. at the last assizes for York, it appeared that the plaintiff was lessee of the corporation of Kingston upon Hull; and he proved a prescription in them to an exclusive ferry between that place and Barton, on the opposite coast of Lincolnshire, with the exceptions before stated. And it appeared that the defendant, who was the owner of a market-boat at Barrow, had carried over persons at different times than on market-days from Kingston upon Hull to Barrow, to which place they were going, and which lies two miles lower down the Humber than Barton, upon the same coast. It was shewn that there was a daily ferry between Kingston and Barton, but none to any other part of the Lincolnshire coast. A verdict was taken for the plaintiff of 1s. with liberty for the defendant to enter a nonsuit in case the Court should be of opinion that the plaintiff was not entitled to recover under these circumstances. A rule *nisi* having been granted for that purpose,

Law and Wood now shewed cause; contending, that if the conduct of the defendant could be justified in this instance, it would render a right of ferry perfectly nugatory. Every person then, by going a little to the right or left of the usual track of the ferry, may equally avoid the ferry: but that would annihilate the right itself. Perhaps it might be difficult to draw the exact line to which the exclusive right extended; but that ought to be governed by usage: now here the usage attaches upon these market-boats on certain occasions; and while it allows the use of them for such purposes, it prohibits them from all others. Then as the defendant carried over several persons, who were not going to market, the plaintiff is entitled to recover. Ferries in general must have some considerable extent upon which their right may operate, otherwise the exclusive privilege would be of no avail. That extent must be governed by local circumstances; and therefore a central situation is for the most part chosen, as that which upon the whole will be most convenient, though, from the nature of the thing, it cannot be equally convenient to all. And there is the greater reason for supporting such rights,

because the owners of ferries are bound at their *peril to supply them for the public use ; and are therefore fairly entitled to preserve the exclusive advantage arising from them. But they admitted, on a question being asked by the Court, that the ferryman was not compellable to provide boats to any place on the Lincolnshire coasts besides Barton.

1792.
 TRIPP
 v.
 FRANK.
 [*668]

LORD KENYON, Ch. J. :

It seems to me that the evidence does not support this action. If certain persons wishing to go to Barton had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here these persons were substantially, and not colourably merely, carried over to a different place ; and it is absurd to say that no person shall be permitted to go to any other place on the Humber than that to which the plaintiff chooses to carry them. It is now admitted that the ferryman cannot be compelled to carry passengers to any other place than Barton : then his right must be commensurate with his duty.

ASHHURST, J. :

The plaintiff's claim is so unreasonable, that it cannot be supported. According to his argument, if a passenger wished to cross over from Kingston to the Lincolnshire coast three miles eastward, he must necessarily be first carried to Barton, where he would be many miles distant from his place of destination ; whereas, if it were not for this ferry, he might go over directly. But the admission which the counsel have made is decisive against the plaintiff.

BULLER, J. :

The question here is, what right the plaintiff has established by evidence ; and that extends only from Hull to Barton, and back again. The question of fraud might arise in this way ; by saying that, though the defendant really meant to go to Barton, he went in fraud of the plaintiff's claim a little above or below the ferry. But in this case the defendant had no intention of

1792.
 TRIPP
 v.
 FRANK.

going to Barton: his place of destination was Barrow, at the distance of two miles from Barton; to which place the plaintiff's right does not extend, and to which he says he is not compellable to go.

GROSE, J. of the same opinion.

Rule discharged.

1792.
 May 14.
 [682]

ENGLAND ON THE DEMISE OF SYBURN v. SLADE.

(4 T. R. 682—683.)

In the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining twenty-one, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than twenty years. In ejectment by landlord against tenants, whose lease is expired, the latter is not barred from shewing that his landlord's title is expired.

THIS was an ejectment for an estate in Lewisham, called the George Inn. The estate belonged originally to one George Pym, under whom the lessor of the plaintiff held a lease of it for twenty-one years, which expired at Lady-day, 1791. Syburn under-let to the defendant from Christmas, 1789 to 1790, who held on, and had regular notice to quit at Christmas, 1791.

The counsel for the lessor of the plaintiff objected at the trial before Gould, J. at Maidstone, to any evidence being received as between landlord and tenant of the landlord's title having expired; but in this he was over-ruled: and the defendant shewed as above mentioned the expiration of the lease under which the lessor of the plaintiff claimed. In reply to this, another lease to the lessor of the plaintiff was given in evidence from one John Pym, a natural born son of George Pym, dated 16th *October, 1789, for eighty-eight years from 16th February, 1791; and it was proved that John Pym claimed under the will of George Pym, dated 31st December, 1777, who thereby devised the estate in question to the use of trustees in trust for John Pym, and to convey the same to him immediately on his attaining twenty-one; and in the meantime for his maintenance. Pym, the son, came of age in September, 1788. No conveyance

from the trustees to John Pym was proved ; and therefore it was objected that, the legal estate being in the trustees, the lease ought to have been granted by them. To which it was answered that this was the case of a plain trust, and that a conveyance should be presumed. But GOULD, J. thought the objection valid ; and that there was not length of time sufficient to raise such a presumption. The plaintiff therefore was nonsuited ; but he had leave to move to set aside the nonsuit, and enter a verdict for him, if the Court should be of a different opinion. For which purpose

1792.
—
ENGLAND
v.
SLADE.

Bond, Serjt. obtained a rule *nisi* on a former day, insisting upon the above objections ; which were now opposed by

Shepherd, on the same grounds as at the trial.

LORD KENYON, Ch. J. [to whose opinion the other judges assented]:

As to the first objection, there is nothing in it. It was certainly competent to the defendant to shew that the lessor's title had expired ; and that he had no right to turn him out of possession. As to the other objection, I do not know that Pym had not the legal estate in him. There is no reason why the jury should not have presumed a conveyance from the trustees to him, upon his attaining the age of twenty-one, in pursuance of their trust ; according to what was said by Lord MANSFIELD in *Lade v. Holford*.* It was what they were bound to do ; and what a Court of equity would have compelled them to have done if they had refused. But it is rather to be presumed that they did do their duty. And as to the time, the jury may be directed to presume a surrender or conveyance in much less time than twenty years.

Rule absolute.

* Bull. N. P. 110.

1792.
May 19.
 [690]

HOWELL AND OTHERS *v.* MAC IVERS AND OTHERS.
 (4 T. R. 690.)

An assignment of a chose in action need not be by deed. [1 Saund. 210.]

ASSUMPSIT on a contract by three. Plea, The bankruptcy of one of them before the action brought. Replication, That before his bankruptcy he assigned his interest in the contract to the other two. To which there was a general demurrer; in support of which,

[*Russell* contended, That the replication should have stated by what deed the assignment was made; so that the defendant might have craved oyer of it.]

Wood, contra:

It is not necessary that an assignment of a chose in action should be by deed, and, therefore, it is no ground of demurrer that it is not so stated.

The COURT were of the same opinion; but they gave leave to the defendant to withdraw the demurrer, and take issue on the assignment.

1792.
May 19.
 [691]

SMITH *v.* WOODCOCK.
 THE SAME *v.* DUDLEY.
 (4 T. R. 691.)

If separate actions be brought against the acceptor and indorsers of a bill, the Court will stay proceedings against any of the indorsers on payment of the bill and costs of that action; but not against the acceptor, without payment of costs in all the actions. [See *R. v. Sheriff of London*, 2 B. & Ald. 192.]

THE first of these was an action by the holder, against the drawer of a bill; the second against one of the indorsers. There was also another action pending, by the same plaintiff against another indorser; and a fourth action against the acceptor, who had refused payment. A rule *nisi* was obtained on behalf of Wood-

cock and Dudley, why, upon payment of the amount of the bill and the costs of these two actions, all proceedings should not be stayed against them.

1792.
SMITH
v.
WOODCOCK.

Lawes opposed the rule, on the ground that the costs of the other actions should also have been paid : but

Per CURIAM :

That is only necessary when the application for staying proceedings comes from the acceptor, who is the original defaulter, and against whom all the costs occasioned by his default may be recovered.

Rule absolute.

K. B. TRINITY TERM.

THE KING v. THE MAYOR, ETC. OF YORK.

(4 T. R. 699—700.)

1792.
June 8.
[699]

Mandamus granted to the Mayor, &c., of York to put the corporate-seal to the certificate of the election of the recorder, on an affidavit that he had the majority of legal votes ; though it was stated that the other candidate had the majority at the election, and that the corporation had already certified his election. [6 East, 360.]

BOWER moved for a mandamus, to be directed to the defendants, to compel them to put the corporate-seal to the certificate of the election of Mr. Withers, as recorder, on an affidavit that he had the majority of legal votes at the election, in order that he might apply to the king for his approbation ; and he prayed that it might be absolute in the first instance. Mr. Withers stated in his affidavit that at the election there were only 101 legal voters, 51 of whom voted for him ; but that one Brown, who had no title, and who has since been ousted by judgment on a *quo warranto* information, was permitted to give his vote for Mr. Sinclair, in whose favour the mayor then gave the casting vote.

1792.

THE KING
v.
THE MAYOR
OF YORK.
[*700]

**Erskine*, on the part of Mr. Sinclair, and

J. Heywood, for the corporation, opposed this. They stated that Mr. Sinclair, having a majority of votes at the election, was declared duly elected; upon which the corporation certified his election to the secretary of state, in order that the king might approve of him. They contended that the subsequent ouster of one of Sinclair's voters did not destroy his election; because Brown was at that time in the possession of his corporate franchise; and that even if it were doubtful whether or not the judgment against Brown had a retrospect so as to affect his vote, given when he was a corporator, this was not the proper mode of trying the legality of Mr. Sinclair's election. * * * * They cited *R. v. The Mayor of Colchester*,* where, on a similar application, the Court refused the mandamus; saying, that Mr. Smithies, the person elected recorder, should be first ousted by a *quo warranto* information; and that "the consequence of granting the rule would be that a second person would be admitted to an office, which was already filled by another, both claiming to be duly elected." But

The COURT said: That the present application was a matter of course, like a motion to swear in a corporator. That the granting of the mandamus would not be conclusive on Mr. Sinclair; for that the writ only required the corporation to do the act, or to shew cause why they do it not; and that all the arguments which could be urged in favour of Sinclair might be pressed on the return to the mandamus, in a much more solemn manner than in the present form.

Rule absolute.

* 2 T. R. 259; 1 R. R. 480.

DOO AND ANOTHER v. BRABANT AND ANOTHER.

(4 T. R. 706—710.)

1792.

June 13.

[706]

A. bequeathed money to trustees in trust for B. till she should attain twenty-one, and then to pay the same to her; and if B. should die under twenty-one, leaving a child or children, then in trust for such child or children; but if B. should die under twenty-one without leaving any child or children, then in trust for C.'s three nieces. B. attained twenty-one, married, had two children, and died in the life of the testatrix: B.'s children took nothing by the will.

THE case was sent here by the direction of the Lord Chancellor. And the question arose on the will of S. Counsell, who gave certain money in the funds to trustees in trust for S. Counsell, daughter and only child of her late husband deceased, then of the age of twelve years, until she should attain twenty-one: and when and so soon as she should attain that age, then upon trust to pay and transfer the same to S. Counsell, her executors, &c. to and for their own use and benefit; and in case S. Counsell should die under twenty-one, leaving any child or children of her body lawfully begotten, then in trust for all and every such child and children who should live to attain his or their age or ages of twenty-one, and to be equally divided between them. But in case S. Counsell should die under twenty-one without leaving any child or children, or being such, they should all die under twenty-one, then in trust for her three nieces Mary, Ruth, and Sarah Ogle. S. Counsell the daughter married B. Doo, attained the age of twenty-one, and had two children living at the time of her death which happened in the lifetime of the testatrix. The two children of S. Counsell the Younger were the plaintiffs in the suit, and Ruth (formerly Ruth Ogle, the survivor of the three nieces of the testatrix) and her husband were the defendants. Ruth Brabant is the next of kin of the testatrix. The question was, Whether the plaintiffs took any and what estate under the will of S. Counsell?

Shepherd,* for the plaintiffs, argued that the children were

* This case and the next were argued in Easter Term, but the certificates were not sent till the present.

1792.
 Doo
 v.
 BRABANT.

[*707]

entitled under the will. It was undoubtedly the intention of the testatrix that her grandchildren should take before her nieces. The three objects of her bounty were, 1st, Her daughter; 2dly, Her grandchildren; and 3dly, Her nieces; the last of whom were not to take while her daughter or her grandchildren were alive. S. Counsell's dying under twenty-one, was not a condition precedent to her children taking; the bequest to her was a conditional limitation. And if an estate be given on a conditional limitation, and there be a limitation over, and the first fail on any account, the last shall take place: *Moor*, 486; *Arelyn v. Ward*, 1 Ves. Sen. 422. Nay, words of condition may be *taken as words of limitation, where there is a remainder over: *Andrews v. Fulham*, 2 Str. 1093; *Jones v. Westcomb*, 1 Eq. Cas. Abr. 245, pl. 10. *Gulliver v. Wicket*, 1 Wils. 105, on the same will. In *Strange* the case is thus stated: A bequest of leasehold premises "To my wife for life, remainder to such child as she is now supposed to be *ensient* with, and to the heirs of such child for ever; provided that if such child as shall happen to be born shall die before twenty-one, having no issue, the reversion of one-third shall go to my wife and her heirs, one-third to my sister Elizabeth and her heirs, and the remaining one-third to my sister Anne and her heirs." His wife was not *ensient*; and the objection was, that as there was no such child, those who claimed in remainder on the dying of such person under twenty-one, and without issue, could never enjoy the estate; but the Court said, That the limitation over should take place; and that "it is no unusual thing for words of condition to be taken as words of limitation, where there is a remainder over." The case of *Statham v. Bell*, Cowp. 40, is to the same effect. In *Willing v. Baine*,* A. gave 100*l* to each of his children, payable at twenty-one, and if any of them died before twenty-one, then his legacy was to go to the survivors. One died in the testator's lifetime; and it was held, that though the legacy was lapsed as to the legatee dying under twenty-one, yet it was well given over to the survivors. Many other cases shew that where there is a devise to A. remainder to B., and A. die in the devisor's lifetime,

* 3 Pr. Wms. 113.

B. shall take. The case of *Gough Calthorpe v. Gough*,* which was *relied on by the defendants in the Court of Chancery, is

* *Gough Calthorpe v. Gough* and others—At the Rolls, 17th and 18th February, 1789.

Sir Henry Calthorpe, by his will dated 27th February, 1741, directed that 10,000*l.* part of his personal estate, should be placed out by his executors, in their own names, in some of the public funds, to the use and intent that they should pay the interest thereof, during the joint lives of Sir Henry Gough and dame Barbara, his wife, into the proper hands of the said dame Barbara, or as she alone should by writing appoint, the same being intended to be at her sole use and disposal; and in case she should die in the lifetime of her husband, to the intent that they should pay the said 10,000*l.* or any part thereof, in such manner, and to such persons as the said dame Barbara should, by writing attested by two witnesses, appoint; and for want of such appointment, to pay the same unto and amongst all the children of the said dame Barbara who should be then living, equally; and if no such children should be then living, to pay the same to such person as should be then in possession of the testator's real estate, by virtue of his will; but if the said dame Barbara should survive the said Sir Henry, her husband, then the said executors should, after the death of the said Sir Henry, pay the whole sum of 10,000*l.* to the said dame Barbara, to her own use; and the testator directed that all the residue of his personal estate be laid out in the purchase of land, and settled to the uses therein mentioned. On the 7th March, 1745-6, the testator made a codicil in his own handwriting, by which he appointed another executor and trustee "to see

and cause to be paid, at equal payments, the legacy to his sister Lady Gough;" and afterwards followed these words, "In case my sister's children do not live to their several ages of twenty-one years, the legacy left to her is to revert to my heir at law." Lady Gough survived Sir Henry her husband, but died in the lifetime of the testator, leaving the plaintiff and also the defendants Richard Thomas Gough, John Calthorpe Gough, Elizabeth Gough, and Barbara, the wife of Isaac Spooner, and Lady Palmer, the wife of the defendant Sir John Palmer, her surviving; Lady Palmer died afterwards in the lifetime of the testator; and the testator, who became a lunatic in the year 1747, and continued so till his death, died 14th April, 1788. The plaintiff, Sir Henry Gough Calthorpe, filed his bill, praying that the residue of the testator's personal estate, which was directed to be laid out in land, and to be settled on himself in tail, with remainder to the defendant Richard Thomas Gough in tail, with remainder to the defendant John Calthorpe Gough in tail, with remainder to the plaintiff in fee, might be paid to him; and that it might be declared that the legacy of 10,000*l.* was lapsed.

Mitford and *Trower* insisted that Lady Gough having survived her husband, the legacy became immediately absolute to her, and all the former directions as to the 10,000*l.* were at an end; and as she afterwards died in the lifetime of the testator, the legacy was lapsed. That it was clear this was the intention of the testator; for if Lady Gough had been a widow at the time the will was made, the testator would have

1792.
Doo
c.
BRABANT.
[*708]

[708]

1792.

Doo

r.

BRABANT.

[*709]

distinguishable from the cases now cited; because there was no *limitation over after dame Barbara's death. The Courts have

given her the legacy absolutely, and would have made no mention of her children.

Lloyd and Romilly, for the defendants, contended, That they, together with the plaintiff, were entitled to this legacy of 10,000*l.* equally; that it appeared to be the intention of the testator, if Lady Gough should make no appointment, and should, for any reason, be incapable of taking the legacy herself, it should go amongst all her children; and that in the event which had happened, no appointment had been made; and Lady Gough could not take the legacy. They cited *Jones and Westcomb*, 1 Eq. Ca. Abr. 245, and *Statham and Bell*, Cowper, 40. In the last of those cases a testator, reciting that his wife was then pregnant, declared that if she brought forth a son, he should inherit his estate at twenty-one; if a daughter, he gave one moiety to his wife, and the other to his two daughters equally, at twenty-one; if either died before that time, the survivor to have her share; if both died, he gave his estate to his wife and her heirs. The testator's wife was not with child; and the only daughter of the testator died an infant. The Court held, that the wife was entitled to the estate, because it was the plain intention of the testator, that if no son should be born, and she should have no daughter live to attain twenty-one, the wife should have the whole estate; and so in the present case it appeared to be the plain intention of the testator if Lady Gough could not take the legacy, and should not appoint to whom it

should be paid, that it should go to her children; and that the codicil shewed this intention more clearly, for the testator there mentioned the event in which (and it is to be presumed in which only) the legacy was to go to the person entitled to the personal estate, viz., their dying before they attained twenty-one years.

MASTER OF THE ROLLS:†

This is an absolute legacy to Lady Gough, qualified on account of her situation as a married woman. If she died in the lifetime of her husband, she had a power of disposing of it; and if she did not so dispose of it, it was to go to her children: if she survived her husband she was to have it absolutely. There was no event in which the children could take anything, which it was not in her power to deprive them of. The testator presumed (as every testator does) that the persons who were to take under his will would survive him. If the testator had foreseen the event which has happened, he probably would have provided for it; but that consideration ought not to influence my judgment, for the same observation will apply to all cases of lapsed legacies. As to the codicil, I cannot see that it makes any difference: Lady Gough would have taken the legacy just in the same manner under the codicil as if it had remained upon the will alone.

His Honour did not decree the personal estate to be paid to the plaintiff, although both the defendants who had remainders in tail consented to it,† but referred it to the Master to inquire what were the

† Sir R. P. Arden.

† *Vide Trafford v. Boehm*, 3 Atk. 447.

[709]

even gone so far as to supply words in a will, where the intention was clear. *Fonnereau v. Fonnereau*, 3 Atk. 315. In *White v. Barber*,* under a devise in trust for such child or children as the devisor's wife should be *ensient* with at his death, it was held that sons born in his lifetime should take: in that case this Court in their certificate acknowledged that there was a defect of expression in the will, but supplied the necessary words; and in *Doe d. Watson v. Shippard*,† the Court would not supply the words supposed to be omitted, because the intent was not clear: but Lord MANSFIELD expressly said, "The Court might supply the omission of express words if they found a plain intent." Now in this case it is a clear that the testatrix meant that her grandchildren should take before her nieces; and therefore the Court may supply the necessary words.

1792.
Doo
v.
BRABANT.

Chambre, contrà, was stopped by the Court.

LORD KENYON, Ch. J.:

Nothing can be more clear than the words of this will. The devise is to S. Counsell when she shall attain the age of twenty-one; and if she shall die under twenty-one, leaving children, then to those children; but she did not die under that age, and therefore nothing can pass to the grandchildren. If this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the grandchildren: but as she has not done so, we cannot make a will for her. This is distinguishable from the cases cited; for here nothing was given to the grandchildren but upon an event which did not happen.

limitations of the estate to be purchased with the money, and whether any person besides the defendants

had any interest in it.‡

* 5 Burr. 2703.

† Dougl. 75, 3rd edit.

‡ The will in this case was not proved by witnesses; and it was said at the bar that it was not necessary that it should be proved, it being above thirty years old; and the counsel mentioned a case of *Mackery and Newbolt*, in which Sir LLOYD KENYON, Master of the Rolls, decided, that a

will above thirty years old should be read without proof, although the testator had died very recently. That point, however, was not decided in this case; because Sir H. G. Calthorpe, who was the heir at law, admitted the will and claimed under it.

1792.

ASHHURST, J. of the same opinion.

Doo

v.

BRABANT.

[710]

BULLER, J. :

The testatrix intended to give the whole to S. Counsell, if she attained the age of twenty-one, and the children nothing; she did attain that age, and therefore nothing was intended to be given to the children in that event. There is a distinction in some of the cases, *Willing v. Baine*, and a case there referred to, between words giving a remainder over, and an original devise : in those cases the devise was good, not as remainder over, but as an original devise : but here was no original devise to the grandchildren but on an event which did not happen.

GROSE, J. :

The event which has happened was not foreseen, and therefore not provided for.

Lord KENYON then said, That the form of the case must be altered, as in *Sabbarton v. Sabbarton*,* before the Court could certify to the Lord Chancellor; for that, as it now stood, of a limitation of money, they could not take judicial notice of it.

The case having been since altered accordingly, in which it is stated as a limitation of a term of years, the following certificate† was sent by this Court :

“ We have heard Counsel, and considered this case; and are of opinion that the plaintiffs took no estate whatever in the said leasehold premises by virtue of and under the said will of the said Sarah Counsell; the events upon which the limitation under which they claim was to take place not having happened.

“ 9th June, 1792.

“ KENYON.

“ W. H. ASHHURST.

“ F. BULLER.

“ N. GROSE.”

* Cas. Temp. Talb. 245.

† This certificate was confirmed, and the bill dismissed accordingly by the Lords Commissioners holding the Great Seal. See Br. C. C., vol. 3,

p. 399. The apparent conflict of authorities is observed upon in the judgment in *Brookman v. Smith* (1871), L. R. 6 Exch. 291, 303, 40 L. J. Exch. 161.—R. C.

HENRIETTA MARIA ATHERTON, ELIZABETH
ATHERTON, AND HESTER ATHERTON, v.
B. PYE, AND ELIZABETH HIS WIFE, P. LEGH,
AND W. MAIRE.

1792.
June 13.
[710]

(4 T. R. 710—713.)

A. devised "to all and every the daughter and daughters of the body of B. and the heirs male of the body of such daughter or daughters, equally between them; if more than one, as tenants in common: and for default of such issue, he devised all his said lands to C.;" held that the daughters of B. took cross-remainders.

THIS case was sent here from the Court of Chancery. T. Benet, being seised in fee, devised all his manors, lands, &c. in the counties of Wilts, Yorkshire, Southampton, and *elsewhere, to his daughter Martha, the wife of P. Legh, for life; remainder to his grandson Benet Legh, son of M. Legh, for life; remainder to trustees to preserve contingent remainders; remainder to the heirs male of the body of his grandson lawfully to be begotten; and for default of such issue, to the second, third, and other son and sons of his daughter Martha, severally and successively, and to the several and respective heirs male of the several and respective bodies of such son and sons, &c.; and in default of such issue, to "all and every the daughter and daughters of the body of his daughter Martha, and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants; and for and in default of such issue, he gave and devised all his said premises unto his right heirs for ever." The deviser died, leaving his daughter Martha, his only child, his heiress at law. P. Legh and Martha his wife, had issue four children, viz. the said Benet Legh, Henrietta Maria, Elizabeth, and Hester Legh. B. Legh died in the lifetime of his mother, an infant and unmarried, leaving his three sisters his co-heiresses at law. Elizabeth Legh married J. A. Keck, Esq. who is long since dead, leaving Elizabeth his wife surviving, and who is now the wife of the defendant Bathurst Pye. Henrietta Maria Legh married Robert Vernon Atherton Gwilym, afterwards called Robert Vernon Atherton Atherton, and they had issue seven children, viz. Atherton Legh

[*711]

1792.
 ATHERTON
 v.
 PYE.

[*712]

Atherton, the three plaintiffs, and three others, who died in the lifetime of their parents, infants, and unmarried. Henrietta Maria Atherton the mother, died in September, 1779, in the lifetime of Robert Vernon Atherton Atherton her husband ; and she at her death left Atherton Legh Atherton, her only son and heir at law, and the complainants her only younger children. Robert Vernon Atherton Atherton died in July, 1783. Martha the wife of Peter Legh, the devisor's daughter, and the first tenant for life under his will, died 21st June, 1787. In Michaelmas Term 1787, Hester Legh suffered recoveries of her third of the estates limited to her by her grandfather's will, and of which she entered into possession upon the death of her mother Martha ; and by deeds duly executed, declared the uses of the recoveries to herself in fee. Atherton Legh Atherton, the son of Henrietta Maria, one of the devisor's grand-daughters, died an infant in March, 1789, and unmarried ; on whose death there became a total failure of issue male of Henrietta Maria, and he left the plaintiffs his only sisters and co-heiresses at law ; *and they as such thereupon became, together with Hester Legh and Elizabeth now the wife of the defendant Bathurst Pye (the two surviving daughters of Martha Legh) the co-heiresses at law of the devisor. Hester Legh died on the 8th of July, 1789, unmarried, and without issue, leaving Elizabeth Keck, now Elizabeth Pye, her surviving sister, together with the plaintiffs, her nieces, her co-heiresses at law, and who are now become the co-heiresses at law of the devisor.

The question was, Whether the plaintiffs upon the death of Atherton Legh Atherton, their brother, took any and what estate or interest under or by virtue of the will of T. Benet, the devisor, their great-grandfather, in the estates devised by his will, as three of the co-heiresses at law, of the said devisor, or in any other manner ?

Wood for the plaintiffs :

* * * No cross-remainders can be raised but by express words or necessary implication. *Comber v. Hill*, 2 Str. 969. In *Pery v. White*,† the rule respecting cross-remainders by implica-

† Cowp. 780.

tion is clearly laid down : “ That wherever cross-remainders are to be raised between two, and no more, the presumption is in favour of cross-remainders ; where they are to be raised between more than two, the presumption is against cross-remainders ; though that presumption may be answered by circumstances of plain and manifest intention.” Now here, if they be implied, they must be implied between more than two ; and the intention of the devisor will be defeated by raising cross-remainders ; for he expressly devised to the grand-daughters as tenants in common, and not as joint-tenants, which is a severance of the title. * * *

1792.
 ATHERTON
 v.
 PYE.

LORD KENYON, Ch. J. (stopping *Chambre, contra*) :

Although the cases upon this subject run extremely near to each other, *many of them are so like the present, that they must decide it. It is true that as between two only it shall be presumed that cross-remainders were intended to be raised : but if there be more than two, it is necessary to resort to other words in the will to discover an intention to raise cross-remainders ; but here there is no doubt, from the words of the limitation over, but that the devisor intended to raise cross-remainders between the grand-daughters. The devise is “ To all and every the daughter and daughters of the body of my daughter Martha, and the heirs male of the body of such daughter or daughters, equally between them, if more than one, as tenants in common, and not as joint tenants ; and for and in default of such issue (namely, the daughter or daughters) then I give and devise all my said premises unto my right heirs for ever.” He clearly intended, therefore, that the whole should go together ; whereas if no cross-remainders be raised between the grand-daughters, it would go to the right heirs by separate portions on the death of each grand-daughter.

[*713]

BULLER, J. :

This is a stronger case for raising cross-remainders than that of *Phipard v. Mansfield* ;† for here, besides the words “ for

† Cowp. 797.

1792.
 ATHERTON
 v.
 PYE.

default of such issue," namely, issue of all of them, the devise over is of all the devisor's estates: now they cannot all go together but by making cross-remainders between the grand-daughters.

The following certificate was sent to the Court of Chancery :

" We are of opinion, That upon the death of Benet Legh, and his mother Martha Legh, the daughters of the said Martha took under the will of Thomas Benet, the testator, estates in tail male, with cross-remainders ; and consequently that the plaintiffs, upon the death of Atherton Legh Atherton, took no estate or interest under or by virtue of the said will of the said Thomas Benet.

" 13th June, 1792.

" KENYON.

" W. H. ASHHURST.

" F. BULLER.

" N. GROSE."

1792.
 June 15.
 [717]

GRIMSTEAD v. MARLOWE.

(4 T. R. 717—719.)

A custom to take a profit *in alieno solo* is bad ; such a right can only be claimed by prescription.

To trespass for breaking and entering the plaintiff's close, in Leatherhead, the defendant pleaded that the *locus in quo* was part of a certain ancient common field called the Common Meadow ; and then justified under this custom, " That every inhabitant occupying, residing, and dwelling in any ancient messuage or tenement, within the parish of Leatherhead, for the time being, from time whereof, &c. hath been used and accustomed to have common of pasture in and throughout the said common meadow, whereof the said close, &c. is parcel, for all his horses and cows *levant* and *couchant* upon such ancient messuage or tenement with the appurtenances (for a certain part of the year, mentioning it) as to the said messuage or tenement with the appurtenances belonging and appertaining," &c. The right was claimed in another plea by a custom for " every occupier of a messuage or land

within the parish of Leatherhead," &c. To these pleas there was a general demurrer.

1792.

GRIMSTEAD

v.

MARLOWE.

Gregg, in support of the demurrer, was stopped by the Court.

Palmer, contra, relied on the case of *Bean v. Bloom*,† where it was held that a right to take a profit *in alieno solo* might be claimed either by custom or prescription. *Gateward's* case,‡ which is the leading case on this subject, did not affect the present; because there the right was claimed by inhabitants. * * *

*The case was distinguishable from that of *Hardy v. Hollyday*, mentioned by BULLER, J. in the last term; § because there the custom was claimed by tenants and inhabitants; which according to *Gateward's* case, could not be supported.

[*718]

LORD KENYON, Ch. J. :

From the time of *Gateward's* case to the present moment, it has been considered as clear and established law that such a right as the present cannot be claimed by custom. The difference between claiming such a right in a declaration and a plea is also well established. In the former the plaintiff is permitted to declare generally on his possession; in the latter a legal title must be set forth. But it is to be remembered, that we are now called upon to decide on a strict legal title, as set forth in a plea; and the right which is claimed is to take a profit *in alieno solo*; but that, according to *Gateward's* case, and the case of *Hardy v. Hollyday*, cannot be claimed by custom. There may be a custom for an easement, as a right of way, *in alieno solo*; but for a profit *à prendre*, the party must prescribe in a *que* estate.

ASHHURST, J. :

When a plaintiff in possession brings an action on the case

† 2 Bl. Rep. 926, S. C. 3 Wils. 456.

‡ 6 Rep. 59, b.

§ This case of *Grimstead v. Marlowe* was to have been argued in the last term; but when it was called on, Mr.

Justice BULLER read a note of *Hardy v. Hollyday*, E. 5 G. III. C. B., of which the defendant's counsel was not before apprised; and therefore this case stood over till this term.

1792.
GRIMSTEAD
v.
MARLOWE.

against a wrong-doer, it is sufficient to declare against him generally, without disclosing any title. But where it becomes necessary to justify under a right in a plea, such right must be set out formally. And I have always understood it to be clear that a defendant cannot plead such a right as the present under a custom; but that he must prescribe in a *que* estate for a profit *à prendre*.

BULLER, J. again read the following note of *Hardy v. Hollyday*, which he said was one of Lord Ch. J. King's manuscripts:

[*719]

"Replevin of cattle. Avowry for damage feasant. The plaintiff in bar of the avowry saith, that the place in question, called Staines Croft, is a certain piece of land, containing, &c. at Cambridge, &c.; that W. Hardy was a tenant and inhabitant of and in a certain ancient messuage in Cambridge, &c.; that Cambridge is an ancient borough, and there is a certain ancient laudable custom, from time whereof, &c. that every tenant *and inhabitant of and in any messuage within the said borough has had and been used and accustomed to have and ought, &c. common of pasture for all cows, &c. *levant* and *couchant*, from the first of August to the 24th day of August in every year, &c.; and that the plaintiff being a tenant and inhabitant, &c. put in the cattle distrained, &c. Demurrer, assigning for cause, that the plaintiff should have prescribed that he and all those whose estate he hath, &c. and not have alleged it by custom in the borough; of which opinion was the Court; who said, that the inhabitants of a vill or place cannot allege or plead a custom within such a vill or place to have an interest or profit *à prendre* out of another's soil. That the plaintiff might have prescribed that he, and all those whose estate he hath in his house, have used to have common; but he cannot allege it by way of custom; or he might have prescribed in the corporation, that the town of Cambridge was a corporation time out of mind, and that the corporation for themselves and every burgess had common, &c.; as *Mellor v. Spateman*, 1 Saund. 399, 348. That where a profit is to be claimed out of another man's soil, it must be alleged by way of prescription and not by custom; unless in the case of a copyhold tenant against his lord; or where the

party pleading is a stranger to the title ; as *Starr v. Rookesby*, Salk. 385 ; case for that he was possessed of a close, adjoining to the defendant's ; and the tenants and occupiers of the defendant's close had time out of mind used to repair the fences, &c. and held good, because it was impossible for the plaintiff, who was a stranger, to set forth the particular estate, interest, and title of the defendant." That case therefore seems decisive of the present. And one objection to the claiming such a right by custom is, that it cannot be released ; whereas if it be annexed to the fee, it may. The distinction which has been mentioned has been uniformly allowed between a declaration and a plea : that in the former you may declare upon possession, in the latter you must set forth a strict legal right.

1792.
GRIMSTEAD
v.
MARLOWE.

GROSE, J. declared himself of the same opinion. But

The Court gave the defendant leave to amend.

WILSON v. RASTALL.

(4 T. R. 753—761.)

1792.
June 18.
[753]

If any matter be disclosed to an attorney in the cause, he cannot be permitted to give it in evidence, either in that or any other action. It is the privilege of the client and not of the attorney : but such privilege is confined to counsel, solicitors and attorneys, when acting in their respective characters.

[THIS action was brought to recover penalties upon the bribery Act, for bribing voters at the last election for the borough of Newark upon Trent, to vote for one of the candidates. Upon a motion for a new trial, amongst other questions, the question was discussed whether the evidence of a certain witness called Handley was rightly rejected. The point decided sufficiently appears from the following judgments:]

LORD KENYON, Ch. J. :

[758]

* * * The evidence of B. Handley was rejected on account of a confidence supposed to have been reposed in him by the de-

1792.
 WILSON
 v.
 RASTALL.
 [758]

[*759]

fendant; for the witness said the letters were delivered to him in consequence of the defendant's consulting him professionally; therefore he was not permitted to give evidence, because it was thought that the privilege of his client prevented him. But in order to see whether or not he were privileged, it is necessary to inquire whether he was in the situation which he assumed to himself. Was B. Handley in a situation over whose conduct his client had an interest? It expressly appears from his own evidence that he was not, nor could be employed as an attorney. And I have always understood that the privilege of a client only extends to the case of the attorney for him; though whether or not it ought to be extended farther, I am happy to think may be inquired into in this cause; for it is a matter of satisfaction to us that every step which we take may be reviewed in another Court, if the defendant choose to tend a bill of exceptions; and therefore our opinion will not conclude the defendant. But in order to shew that the privilege extends beyond the case of an attorney and client, a hard case has been pressed upon our feelings, of confidence reposed in a friend. But if a friend could not reveal what was imparted to him in confidence. what is to become of many cases, even affecting life; *e. g.* *Dr. Ratcliff's* case.† And if the privilege now claimed extended to all cases and persons, Lord W. Russell died by the hands of *an assassin, and not by the hands of the law; for his friend Lord Howard‡ was permitted to give evidence of confidential conversations between them: all good men indeed thought that he should have gone almost all lengths rather than have betrayed that confidence; but still if the privilege had extended to such a case, it was the business of the Court to interfere and prevent the evidence being given. I therefore think that this privilege is only allowed in the case of attorney and client. And it appears to me that B. Handley was not permitted to produce these letters on a supposition, that the privilege of his client prevented him. But one ground, which has been urged against our granting a new trial on account of the non-production of these letters, is, that before the next trial they may be burned: but in *The Attorney-General v. Le Merchant* it

† 9 St. Tr. 582.

‡ 3 St. Tr. 715.

was determined that parol evidence might be given of letters, which were not produced; and that too was the case of a penal action.

1792.
WILSON
v.
RASTALL.

BULLER, J.:

This doctrine of privilege was fully discussed in a case before Lord Hardwicke. The privilege is confined to the cases of Counsel, Solicitor, and Attorney; but in order to raise the privilege, it must be proved that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters; for if he be employed merely as a steward, he may be examined. It is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded. It is a subject of just indignation where persons are anxious to reveal what has been communicated to them in a confidential manner; and in the case mentioned, where Reynolds, who had formerly been the attorney of Mr. Petrie, but who was dismissed before the trial of the cause, wished to give evidence of what he knew relative to the subject while he was concerned as the attorney, I strongly animadverted on his conduct, and would not suffer him to be examined: he had acquired his information during the time that he acted as attorney; and I thought that the privilege of not being examined to such points was the privilege of the party,[†] and not of the attorney: and that the privilege never ceased at any period of time. In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is shut for ever. I take the distinction to be now well settled, that the privilege extends to those three enumerated cases at all *times, but that it is confined to these cases only. There are cases, to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters. This point was very much considered in the *Duchess of Kingston's* case,[‡] where Sir

[*760]

[†] Vid. *Lindsey v. Talbot*, Bull. N. P. 284. amination of Lord Barrington, page 246, 7.

[‡] 11 St. Tr. 243. See also the ex-

1792.

WILSON
v.
RASTALL.

C. Hawkins, who had attended the Duchess as a medical person, made the objection himself, but was over-ruled, and compelled to give evidence against the prisoner. The question therefore here is, Whether B. Handley were privileged with respect to any person? As to W. Handley, he certainly was not; for he said that the witness neither was, nor could be, his attorney; because he was at that time acting as under-sheriff. Neither was he privileged as to this defendant for the same reason; and though it was said that the defendant (by W. Handley) consulted him in his profession as a confidential person, the meaning of that was, that as B. Handley was more conversant with business of this kind than those who were not of his profession, W. Handley consulted him, but did not employ him as an attorney. But it was contended, on the part of the plaintiff, that, supposing the witness were privileged in any action in which W. Handley was a party, the privilege did not extend to this action against Rastall. But to that I cannot accede; for if he were privileged, so as not to be examined to particular points in any action against W. Handley, he could not prove the same facts in an action against any other person; for the nature of this kind of privilege is that the attorney shall not be permitted to disclose in any action that which has been confidentially communicated to him as an attorney. However, as B. Handley was neither the attorney of W. Handley nor of the defendant, I am of opinion that he was improperly prevented from producing the letters in question. * * *

[761]

GROSE, J. concurred.

NESBITT AND ANOTHER v. LUSHINGTON.

(4 T. R. 783—788.)

1792.
June 21.

[783]

If an armed force board a ship, and she becomes stranded, and part of the cargo (consisting of corn) is taken by the mob at their own price, it is *not* a loss by pirates, or by restraint of princes "*and people*," nor can the loss be recovered, as for a general average: but for such part as in consequence of the stranding was damaged and thrown overboard, the insured may recover on a count stating the loss to be by stranding.

THIS was an action on a policy of insurance, on wheat and coals on board the *Industry*, Captain Cassidy, from Youghall to Sligo, for 100*l*. * * * The policy was in the usual form, and the perils insured against were "the seas, men of war, fire, enemies, pirates, rovers, thieves, jettizons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever;" * * * It also contained the common printed "memorandum; corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general; or the ship be stranded."

[784]

[The declaration was framed on the view that the loss was by pirates, or by restraint "of people" within the first clause above set forth.]

It appeared in evidence, that the ship was forced, by stress of weather, into Elly Harbour, in Ireland: and there happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she was stranded; and they would not leave her till they had compelled the captain to sell all the corn (except about 10 tons) at a certain rate, which was about three-fourths of the invoice price. The 10 tons were lost in consequence of the stranding; by which it was damaged, and was obliged to be thrown overboard. The ship afterwards arrived at her place of destination with the remainder of her cargo, which was about 25*l*.-worth of coals. The jury found a verdict as for a total loss; but it was understood, that the real loss would be adjusted if the Court should be of opinion that the

1792.
 NESBITT
 v.
 LUSHING-
 TON.

plaintiffs were entitled to recover under the circumstances. A rule *nisi* having been granted for setting aside the verdict,

Erskine, Law, and S. Haywood, now shewed cause; and proposed to consider, 1st, Whether there had been any loss within the policy? 2. Whether it was a total loss? 3. Whether a general or particular average? 4. Whether the subject insured, being corn, fell within the memorandum in the policy? * * *

[786] *Bearcroft and Baldwin, contra*, were stopped by the Court.

[787] LORD KENYON, Ch. J.: (after stating that the plaintiffs could not recover in the particular form of action laid in the declaration):

That which happened in this case does not fall within the meaning of "arrests, restraints, and detainments of kings, princes, and people." The meaning of the word "people," may be discovered here by the accompanying words: *noscitur à sociis*; it means "the ruling power of the country;" but I think that this loss falls within a capture by pirates: and if a particular average could have been recovered upon this policy, the plaintiffs might have recovered upon the count, stating the loss to have happened by piracy: but this being a policy upon corn, the memorandum states that the underwriter will not be liable for any average, unless general, or the ship be stranded; and I am of opinion that this is not a general average; because the whole adventure was never in jeopardy. There is no pretence to say that the persons who took the corn intended any injury to the ship, or to any other part of the cargo but the corn, which they wanted, in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average. On the meaning of the memorandum I have no doubt. The articles there enumerated are of a perishable nature: as it might be difficult to ascertain whether their being damaged arose from any accident, or from the nature of the articles themselves, this memorandum is inserted in all policies, to prevent disputes; and by it the underwriters expressly provide that they will not pay

1792.

NESBITT
v.
LUSHING-
TON.

any average on these articles, unless it be general, or the ship be stranded. When a ship is stranded, then the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though that fact cannot always be ascertained. Therefore here all the damage done to the cargo thrown overboard may be ascribed to the stranding; but the objection is, that the declaration imputes the loss to another cause. I do not say whether or not there was any moment when the insured might have abandoned: but in fact they did not abandon; and there was a total loss; for the cargo produced three-fourths of its real value, and the ship performed her voyage. On the whole, it appears to me that the plaintiffs are entitled to recover for part of this damage, though they cannot recover in this form of action.

[BULLER, J. gave judgment to a similar effect.]

[788]

GROSE, J. declared himself of the same opinion.

Rule absolute.

K. B. MICHAELMAS TERM.

COOKE v. LOXLEY.

(5 T. R. 4—5.)

1792.

Nov. 10.

[4]

In an action for use and occupation by an incumbent against a tenant of the glebe lands, who has paid him rent, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title.

THIS was an action for use and occupation, tried upon the last Northern circuit before Lord Kenyon. The former incumbent had let some of the glebe lands to the defendant, who had continued tenant to the present incumbent, the plaintiff, and had paid him half a year's rent for the same. This action being brought for some arrears of rent, the defendant offered to give evidence of the plaintiff's having been simoniacally presented,

1792.
 COOKE
 v.
 LOXLEY.

of which the defendant was stated to be ignorant when he paid the former rent: but Lord KENYON refused to receive it, being of opinion that the case fell within the common rule, that a tenant should not be permitted to impeach his landlord's title in an action for use and occupation. There was a verdict accordingly for the plaintiff.

Cockell, Serjt. now moved, and *Erskine* and *Chambre* supported the motion, for a rule to shew cause why the verdict should not be set aside, and a new trial had. They grounded their arguments upon the manifest policy of the 31 Eliz. c. 6, for preventing simony. * * *

[5] LORD KENYON, Ch. J :

Conforming to the uniform decisions in all the cases upon this subject, I ruled at the trial, and continue to entertain the same opinion, that in an action for use and occupation it ought not to be permitted to a tenant, who occupies land by the licence of another, to call upon that other to shew the title under which he let the land. This is not a mere technical rule, but is founded in public convenience and policy. And the only question here is whether that rule shall still prevail: if it do, it applies equally strong to the present case as to all others. Here the defendant, who occupied the land, did so by the permission of the plaintiff, and then refused to pay his rent under an idea that he might contest the plaintiff's right: but the plaintiff could not be supposed to come to trial prepared to meet such a defence and to make out his title; such an action as the present does not involve the question of title. This differs from the cases of usury and smuggling alluded to at the bar; for there the contracts themselves are founded in fraud.

BULLER, J. declined giving any opinion, being connected with one of the parties.

GROSE, J :

It has been said that the rule of not giving in evidence *nil habuit in tenementis* in an action for use and occupation is a

technical rule: but, in my opinion, no rule is better founded in justice and policy than this. The general rule is admitted that in such an action as this the tenant cannot dispute the landlord's title; and no exception to it has been shewn applicable to this case.

1792.
COOKE
v.
LOXLEY.

Rule refused.

PEARSON AND OTHERS, ASSIGNEES OF SCOTT, *v.*
HENRY, ADMINISTRATOR OF HENRY.

(5 T. R. 6—8.)

1792.
Nov. 10.
[6]

A submission to an award by an administrator is not an admission of assets. A promise by an administrator to pay the debts of the intestate, if there be no assets, is *nudum pactum*.*

A RULE was obtained in the last term to shew cause why the nonsuit in this case should not be set aside, and a new trial awarded. It was an action of assumpsit for goods sold and delivered to the defendant's intestate, and the common money counts: to which there was a plea of *plene administravit* alone. At the trial before Lord Kenyon, the plaintiffs, in order to prove assets in the defendant's hands, gave in evidence a submission to an award by him, as administrator, between these parties, and the award, whereby the sum of 2,014*l.* was awarded to be due from the intestate's to the bankrupt's estate, without saying by whom it was to be paid; but the arbitrators directed that the defendant should pay 19*l.*, being half of the expenses of the arbitration. The plaintiffs also offered a witness to prove that when the defendant entered into the arbitration bond he had expressly undertaken to pay whatever might be found owing from the intestate, who was his son, to the plaintiffs.

Lord KENYON rejected that testimony; and also thought that there was no evidence to charge the defendant with assets, and therefore nonsuited the plaintiff.

* See *Barry v. Rush*, 1 T. R. *Barlow*, 7 T. R. 453, reported *in loco*, 691; 1 R. R. 360; *Worthington v. post*.

1792.
PEARSON
v.
HENRY.

Erskine and *Kyd* now shewed cause ; contending that as the arbitrators had not awarded the sum found to be due from the intestate's estate to be paid by the administrator, nor had found any assets in his hands out of which such payment was to be made, the court could not presume assets from the mere circumstance of the defendant's submitting to arbitration.
* * *

[7] *Bearcroft* and *Baldwin*, *contrà*, relied upon the dictum of ASHHURST, J. in *Barry v. Rush* * ; adding that that opinion was not lightly thrown out, but was founded on good sense ; for that it would be nugatory to investigate the truth of the demand, if whether well or ill founded there were no assets to satisfy it.

LORD KENYON, Ch. J. :

On the last point, I think that the witness offered was properly rejected. With regard to the principal question, in point of justice and conscience, the plaintiffs' demand ought not to extend beyond the assets of the intestate: here it is not pretended that in fact there were assets to the extent of the plaintiffs' demand, but it is said that the defendant precluded himself by something which he did at the outset of this business, from denying that he had assets, for that every submission to arbitration by an administrator in that character is conclusive evidence against him that he has assets. In many cases an executor or administrator is desirous of ascertaining whether or not there be any foundation for the demand which is made upon him, without disputing it in an action, and it is frequently advantageous to both parties that the matter in dispute should be referred : but if the reference be attended with this supposed consequence, it will in future prevent every executor or administrator from submitting to arbitration. The case of *Barry v. Rush* was very properly decided, but it does not affect the present. There the defendant submitted in broad terms to pay whatever should be awarded, and the arbitrator did award that he should pay a certain sum : whereas, here, the arbitrator has only ascertained the amount of the debt due from the intestate,

* 1 T. R. 692 ; R. R. vol. i. p. 639.

but has not directed the defendant to pay it. It is impossible then to say that the arbitrator decided that the defendant had assets; and the submission to arbitration by an administrator is not of itself an admission of assets. What was said by my brother ASHHURST in the case of *Barry v. Rush*, respecting the admission of assets must be taken to refer to the particular case then under discussion, but ought not to be extended further. And indeed he immediately subjoined that the bond given by the defendant to abide by the award was an undertaking to pay whatever the arbitrator should award, *without any regard to assets; and my brother BULLER went expressly on that ground.

1792.
PEARSON
v.
HENRY.

[*8]

BULLER, J.:

I only recollect two cases, in which the question, what shall be considered to be an admission of assets, has been discussed; *Barry v. Rush*, and *Cleverly v. Brett*.* In the last of those the executor had paid interest on a bond due from the testator, which was held on the trial at Exeter to be an admission of assets: but that opinion was over-ruled in this court on a motion for a new trial, when it was thought highly unreasonable that, because the executor, thinking the demand just, had chosen to pay a part of a debt out of his own pocket, he should be liable for the whole debt; or that because having enough to pay the interest, he should be thereby concluded to dispute assets for the principal. In the other case, it seems to me that the plea had nothing to do with the case: that was an action of debt on a bond given by the defendant, by which he bound himself, his heirs, &c. for performance of the award; and therefore I said, in deciding that case, that it was a personal engagement by the defendant to perform the award. Another ground has also been mentioned, that the administrator personally promised to pay whatever should be awarded: but that would not avail the plaintiffs in this action; for this action is brought against the defendant as administrator, and it is brought against him to recover the plaintiff's demand out of the intestate's

* *Cleverly v. Brett* and another, said, "To be sure the evidence eases executors. M. 13 Geo. III. B. R. the creditor from proving assets, and In that case Lord MANSFIELD, Ch. J., throws the *onus* on the other side."

1792.
PEARSON
v.
HENRY.

effects ; and if there were no assets, the personal promise by the administrator would be *nudum pactum*. This point was so considered by ASTON, J. in the case I mentioned.

GROSE, J. :

It would be very unreasonable to imply an admission of assets from the mere circumstance of the administrator's submitting to arbitration, so as to affect his own personal estate. If indeed it had been thus solemnly decided in a series of cases, it would have deserved further consideration ; but that does not appear to be the case ; for *Barry v. Rush* was determined on the ground mentioned by my brother BULLER.

Rule discharged.

1792.
Nov. 22.
[41]

THOMPSON v. SYMONDS AND ANOTHER.

(5 T. R. 41—46.)

The assignee of a print may maintain an action on the stat. 17 G. III. c. 57, against any person who pirates it.

In such an action it is not necessary to produce the plate itself in evidence ; one of the prints taken from the original plate is good evidence.

The date must always appear on the print.

[*42]

THIS was an action on the case on the statute 17 Geo. III. c. 57, for pirating a print of the countess of Huntingdon. The declaration stated that the plaintiff before and at the time of the pirating, &c. was the legal and true proprietor of a certain print, &c. which before that time had been drawn and designed by one R. Bowyer, &c. ; and afterwards it stated that the *defendant pirated it, &c. At the trial before Lord Kenyon at the Sittings at Westminster, the plaintiff proved that Bowyer originally published this print in August, 1790, that in July, 1891, he assigned his property in it to Fitler, that the defendant had since that time pirated it ; and he gave in evidence two prints ; the original one published by Bowyer, and another after the plaintiff became the proprietor. On the first print was engraved : “ Painted by Bowyer ; engraved by Fitler ; published as the act

1792.
THOMPSON
v.
SYMONDS.

directs by Bowyer 26th August, 1790." On the second the last part was altered thus: "Published as the act directs by Thompson 26th August, 1790." Two objections were made by the defendant's counsel. 1st, That an assignee of this property could not maintain any action in his own name under the statute; 2ndly, That, if any such action could be sustained, the plaintiff must fail in this, because the evidence did not support the plaintiff's title, inasmuch as the second print, which must be taken to be a counterpart of the plate at present, purported to be an original print by Thompson in 1790, whereas it really was published by Bowyer in 1790. Lord KENYON over-ruled both these objections; and the plaintiff obtained a verdict for 10*l.* but the points were reserved. The statute 8 Geo. II. c. 13, s. 1, vests the property of certain prints in the inventors, designers, &c. for fourteen years "from the day of publishing, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print;" inflicting on other persons printing the same, "without the consent of the proprietor thereof first had and obtained in writing," the penalty of forfeiting the plate, the sheets on which the prints are copied, together with 5*s.* for every print, &c. The second section provides that it may be lawful for any persons, who shall thereafter purchase any plate for printing from the original proprietor, to print and reprint from the said plates, without incurring any penalty. The 7 Geo. III. c. 38, s. 1, extends to prints taken from any pictures, models, &c.; and enlarges the right to twenty-eight years. And the 17 Geo. III. c. 57, gives a special action upon the case, in which the proprietor may recover damages.

Russell moved on a former day to set aside the verdict, and to enter a nonsuit; against which rule cause was now shewn by

Mingay, Garrow, and Lawes:

Answer to the first objection: though the Act 8 Geo. II. does not in express terms give the inventor power to assign, yet the second section speaks of the *purchase of any such print, &c. which necessarily implies that the proprietor may sell. But,

[*43]

1792.
 THOMPSON
 v.
 SYMONDS.

even without such words, the power of selling would attach on the inventors from the first clause, which vests the property in them for a term of years. The injury is done to the proprietor, and not to the engraver or designer, who has parted with his interest; and therefore the former may bring the action. In *Sayer qui tam v. Dacey*,* where such an action was brought by the assignee of the plate, no objection was taken to the action on that account; but the plaintiff failed merely because the day, when it was published, did not appear on the print. As to the other objection: The conditions, of inserting the date of the print and the name of the proprietor, were imposed by the 8 Geo. II. for the purpose of informing the public when the exclusive right of selling would expire, and who was the real proprietor at the time, in order that his consent might be obtained previous to any copy being taken. These conditions were strictly complied with in the first instance; and when the right was transferred to the plaintiff, it became necessary to insert his name instead of Bowyer's, in order that persons, wishing to copy it, might know whose consent to ask for that purpose. The words "published as the act directs by Thompson, 26th August, 1790," only mean that the print was originally published in August, 1790, and that Thompson is the proprietor of it, not that he was so in 1790. The object of the Act in requiring the date was to give information when the right will cease, not when it began; and if the date in this case had been altered as well as the name, the public would have been misled. In *Sayer v. Dacey* the reason given by the Court was, "that any person might know when the proprietor's exclusive right ceased, and when and against whom he might be guilty of offending contrary to the statute."

Erskine and Russell, in support of the rule:

The first objection is not that the inventor cannot assign any interest in the plate to a purchaser, but that the assignee cannot maintain any action against a third person who copies the print, on the ground that he, the assignee, has the exclusive right of selling. The first clause in the 8 Geo. II. inflicts the penalty only on those who sell without the consent of the proprietor;

* 3 Wils. 60.

and the second exempts persons, who may purchase the plates, from the penalties of the Act: the operation therefore of those two clauses, taken together, is, that the purchaser is merely exempt from the *penalties of the statute, but that if any other person copy the plate the action must be brought by the original proprietor, who perhaps may be considered as a trustee for the assignee as to any damages that he may recover. The case in *Wilson* does not prove that such an action as this can be supported: one decisive objection occurred in that case, which prevented the necessity of discussing any others that might have been made. Secondly, The plaintiff claims, on one of his prints, under a title to this print in August, 1790; whereas by his own shewing his real title did not accrue till July, 1791; this was holding out false information to the world. There never existed such a print as that which the plaintiff claims; one published by him in August, 1790. In *Bonner v. Field*,* this objection prevailed. It was an action for pirating a print of the seat of the Countess of Talbot. The plaintiff had been employed by Lady Talbot to engrave this plate for her, which he executed on the 1st of June, 1778, when he took off some impressions for her use: on the 2nd of June, 1778, she gave the plate to the plaintiff, who engraved on the bottom of it "Drawn and engraved by J. Bonner; published on the first of June, 1778, as the act directs." The declaration having stated that the plaintiff was the proprietor on the first of June, Lord MANSFIELD nonsuited the plaintiff on the ground that he had no title on the day when he claimed it. The claim by the inventor is a monopoly, and therefore not to be favoured. For though the Legislature intended to confer a benefit on him, certain conditions were imposed, without complying with which no exclusive right is vested in the inventor, &c. under these statutes. The name of the inventor or engraver should appear on the print, that the public may know who is entitled to the merit of it. Even if the name of the proprietor for the time being ought to appear, still the original name should be left, and that of the assignee added to it, as being the purchaser. But the present mode of substituting one name for another is calculated to mislead the public, by inducing them to believe

1792.
THOMPSON
v.
SYMONDS.
[*44]

* Sittings after Hilary, 1781, at Guildhall, cor. Lord Mansfield.

1792.
 THOMPSON
 v.
 SYMONDS.

that the plaintiff was the original publisher : whereas he neither published it originally, nor had any property in it in August, 1790, the time when he asserts to the public that he published it.

[*45]

BULLER, J. observed that the argument went beyond the point necessary to be inquired into ; for that if the second print were laid out of the case, it would stand thus : The plaintiff *in his declaration shortly states “that he was the legal proprietor of the print designed and published by Bowyer, and that the defendant pirated it, &c. ;” all which allegations (he observed) were proved independently of the second print.

It was then contended that the prints were not the best evidence, and that the plate itself should have been produced, which would have varied from the plaintiff's title. And that it would be a question of doubt whether any action could be maintained on that plate, as altered ; the original plate, on which the assignor's title was founded, being destroyed by the alteration.

The COURT were very clearly of opinion that there was no foundation for the first objection. And as to the second

LORD KENYON, Ch. J. said :

I am very glad that my brother BULLER has discovered a ground on which this verdict may be supported. When the plaintiff purchased of the original proprietor he had everything which the Legislature required : and even if he had afterwards destroyed the plate, his title would have continued. Had the question turned entirely on the point on which it has been argued, I should have thought it involved in considerable difficulty : upon that head my opinion has floated during the course of the argument. It should seem that the reason for requiring the name and the date to appear on the print was that they might convey some useful intelligence to the public. The date is of importance, that the public may know the period of the monopoly. The name of the proprietor should appear, in order that those who wish to copy it might know to whom to apply for consent. It seems therefore necessary that the date should remain, but that the name of the proprietor should be

altered as often as the property is changed. I admit, however, that there is some incongruity in saying that it was published by the assignee at the time when it first bore date, when in fact it was not published by him at all, and his title accrued subsequent to that time. But without deciding that point, I am satisfied that the verdict may be supported on the ground mentioned by my brother BULLER.

1792.
THOMPSON
v.
SYMONDS.

BULLER, J. :

All the difficulty in this case arises from the circumstance of the plaintiff's having proved too much at the trial: he gave in evidence two prints; the one published by Bowyer, the other by himself. If he had rested his case on the production of the first print only, no question could have arisen; for he would then have proved all the allegations in his declaration. *The objection has been made on the other print: but if the plaintiff has a right to this print, and has sustained an injury in consequence of the defendant's having pirated it, it would require a very strong case on the part of the defendant to induce the Court to grant a new trial. Then it was objected that the first print was not sufficient to entitle the plaintiff to a verdict, because the plate itself was not produced. But although several actions of this kind have been tried since the passing of these statutes, in no one of them has the plate itself been produced; the print has been always received in evidence, and no objection taken to it. With regard to the point gone into at the bar, I can see no reason, on reading the Act of Parliament, to distinguish between the date and the person who publishes the print. When the Legislature gave the monopoly to the person who engraved, &c. they required that the date and the name of the person entitled to the monopoly should appear; both of which are required in the same section: "the day of the first publishing shall be truly engraved with the name of the proprietor on each plate." The proprietor there spoken of is the inventor; and the second section, which takes it for granted that the proprietor may assign, says that such assignee "may print and reprint from the said plate;" the meaning of which is that the assignee shall copy from the plate, as it existed at first, in order that the public

[*46]

1792.
 THOMPSON
 v.
 SYMONDS.

may know from the bare inspection of the print that it was taken from the very same plate for which the monopoly was granted.

GROSE, J. :

When the print was originally published, the requisites of the statute were complied with. Then the exclusive right was vested in Bowyer; and the instant he assigned to the plaintiff, the latter had every right that Bowyer had before. This short title is stated in the declaration, and that the defendant pirated it; all of which was proved; and consequently the plaintiff has a good cause of action.

Rule discharged.

1792.
 Nov. 23.

SCHOLES v. HARGREAVES.

(5 T. R. 46—49.)

Common for cattle levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land.

[*47] THIS was an action upon the case for disturbing the plaintiff's right of common. At the trial before Lord Kenyon on the last Northern Circuit it appeared that the *plaintiff, who claimed the right of common in right of a messuage for all commonable cattle levant and couchant, was the owner of a small house wherein he carried on the trade of a butcher. The house had neither land, curtilage, or stable belonging to it; but under the shop window was a sheep-hold, which could contain four or five sheep at a time, but neither horse or bullock could be kept there. About sixty years ago the plaintiff's father, who occupied the same house, exercised the right of common claimed, but he always occupied some land contiguous, together with the house in question. The present plaintiff occupied nothing but the house, but he had also used the common, by turning out upon it, till the morning, such sheep as he did not kill the preceding day. The disturbance was proved. But Lord KENYON, being of opinion that no levancy and couchancy were proved as stated in the declaration, which he held to be necessary, and that the

plaintiff could not claim such a right of common in respect of a house only, without land, nonsuited the plaintiff.

A rule having been obtained to shew cause why the nonsuit should not be set aside, on the ground that it was not necessary to shew that the party claiming such a right of common in respect of a messuage was also in possession of land in order to sustain the allegation of the levancy and couchancy, for that foddering cattle was sufficient for that purpose :

Lambe was now to have opposed the rule: but the Court desired the plaintiff's counsel to begin.

Law, Chambre, Wood, and Holroyd, in support of the rule :

1st. It cannot be necessary to prove levancy and couchancy, in order to support an action for damage to a right of common; for in *Wells v. Watling* † it was held not necessary to prove that the plaintiff turned on any cattle of his own at the time of the injury; for whether he had any cattle or not, his right of common was still damaged by a surcharge. Now if it be immaterial whether the plaintiff have any cattle or not, it must *pari ratione* be equally immaterial whether he had any land whereon they might be levant and couchant, where the right is claimed in respect of a messuage only. This appears from the case of *Emerton v. Selby*,‡ where the plaintiff in replevin prescribed for common in the defendant's land for all his cattle levant and couchant as appendant to his cottage; which on demurrer was objected to be bad because there was no land belonging to a cottage; but the objection was over-ruled, because a cottage *contains a curtilage, and so there may be a levancy and couchancy upon a cottage. And in the report of the same case in *Salk. 169*, *HOLT*, Ch. J. said that "he remembered the trial of an issue, whether levant and couchant, before *HALE*, who held the foddering of the cattle in the yard evidence of levancy and couchancy." Now here the sheep might be foddered in the place where they were kept. But the case of *Patrick v. Lowre* §

1792.
SCHOLES
v.
HAR-
GREAVES.

[*48]

† 2 Black. Rep. 1233.

‡ 2 Ld. Raym. 1015.

§ 2 Brownl. 101.

1792.
 SCHOLLES
 v.
 HAR-
 GREAVES.

is still stronger ; for there the defendant in trespass justified, for that he was seised of a house with the appurtenances, and prescribed to have common in the place for all beasts levant and couchant upon the said house ; and held good ; and that it should be intended for so many of the beasts as may be rising and lying down upon the said house ; and so was the usage and prescription in all boroughs. They also added that many extensive wastes in the North were subject to the same claim of common as the present ; and therefore that the question was of great consequence.

LORD KENYON, Ch. J. :

I have always understood that the levancy and couchancy must be proved by shewing that the party claiming the right was in possession of some land, whereon the cattle might be levant and couchant. Levancy and couchancy are a mode of admeasuring the common ;* but how can the number be ascertained where common is claimed, as in this case, for all commonable cattle.† On that ground I nonsuited the plaintiff, and I see no reason now to alter that opinion. As to the place where the sheep were kept being sufficient for that purpose, it cannot be seriously insisted upon. It was a mere hole under the shop-window. Besides which, the right of common was claimed for all cattle, and it was expressly proved that no horse or bullock could possibly be kept there.

BULLER, J. :

All the cases cited in support of the rule will be found upon examination to be consistent with the rule laid down by my Lord. The only question is, What is meant in those cases by the words messuage and cottage, annexed to which was the right of common claimed ? For in all of them the Court say, that

* *Lascelles v. Lord Onslow* (1877) 2 Q. B. D. 433, 450 ; 46 L. J. Q. B. 333 ; *Robertson v. Hartopp* (1889) 43 Ch. D. 484, 495 ; 59 L. J. Ch. 553.

† In *Richards v. Squibb*, 1 Ld. Ray. 726, it was ruled by HOLR that if a man prescribe for common for a

certain number of cattle as appurtenant, &c., it is not necessary or material to shew they were levant and couchant, because it is no prejudice to the owner of the soil, for that the number is ascertained ; and Vid. *Daniel v. Hanslip*, 2 Lev. 67.

they will intend that land was included therein. And that it is necessary there should be some land annexed to the house is clear from considering what is meant by levancy and couchancy: it means the possession of such land as will keep the cattle claimed *to be commoned during the winter, and as many as the land will maintain in the winter, so many shall be said to be levant and couchant. It was so determined by Lord COKE, as appears in Noy, 80. In *Emerton v. Selby*, which has been cited, the Court held the prescription good for common appendant to a cottage, because a cottage containeth a curtilage; and to make it a lawful cottage within the 31 Eliz. c. 7, there must be four acres laid to it. So in the case in Brownlow the Court said "it shall be intended that there was a curtilage belonging to the house; and [by] the levancy and couchancy shall be intended those beasts which are nourished and fed upon the land, and may there lie in summer and winter." Indeed in Vaugh. 253, it was said that common cannot be claimed for cattle levant and couchant on a messuage. That is right, if by messuage be meant only a house: but all the other cases proceed on the ground that after verdict land shall be understood to be included in the term messuage.

1792.
 SCHOLLES
 v.
 HAR-
 GREAVES.
 [*49]

GROSE, J. declared himself of the same opinion.

Rule discharged.

DOE, ON THE DEMISE OF JOHN LANCASHIRE THE
 YOUNGER, AND MARY LANCASHIRE, v. JOHN,
 JOSIAH, AND JOSHUA LANCASHIRE.

1792.
 Nov. 23.
 [49]

(5 T. R. 49—64.)

Marriage and the birth of a posthumous child amount to an implied revocation of a will of lands made before marriage.†

On the trial of this ejectment, a special verdict was found, in substance as follows. John Lancashire the elder, being seised

† The report of the judgment in this case is retained on account of its importance on the general principle applying to posthumous children.

The actual decision is unimportant in regard to wills made since the Wills Act (1 Vict. c. 26, s. 18).—R. C.

1792.
DOE
v.
LANCASHIRE.

in fee of the premises in question, and being then unmarried, by will dated 6th of April, 1786, duly attested, devised lands to John and Josiah Lancashire, and their heirs, in trust for his nephews Joshua and James Lancashire, their heirs and assigns for ever. After the making of the will, on the 10th of October, 1788, the deviser intermarried with Mary Lancashire, then Mary Collinge, spinster, and lived and cohabited with her until the time of his decease. After the marriage, on the 12th of July, 1790, the said Mary discovered that she was pregnant and with child by her husband, and then made known the same to him, who thereupon expressed an intention to revoke his will, and to make another, and to give the premises to his wife and her heirs, and he gave directions to an attorney to prepare another will accordingly, but died before any other will was prepared. On the 14th of July, 1790, John Lancashire the elder died seised, &c. *^[50]“his said will, dated on 6th of April, 1786, not having been burned or destroyed, or in any manner cancelled, torn, or obliterated, or revoked, or altered by any other will or codicil in writing, or other writing of the said John Lancashire the elder in his lifetime.” After his death, on the 30th of January, 1791, the said Mary was delivered of a male child, the within-named John Lancashire the younger, being the child with which she had discovered herself to be pregnant, and being the only son and heir of John Lancashire the elder.

[The question whether there was an implied revocation of the will was twice argued,† and the Court gave judgment as follows:]

[58] LORD KENYON, Ch. J. :

Considering the very extensive consequences of the rule to be established in this case, which might hereafter affect a variety of cases, we thought we could not proceed with too much circumspection, and therefore we were anxious to obtain every information upon the subject before we decided it. It was with much

† The arguments, which are report, 5 T. R. 50—58. lengthy, will be found in the original

hesitation that any rule on this head was borrowed by our predecessors from the civil law and incorporated into our law. Those rules were introduced by very slow degrees; and though the cases of *Overbury v. Overbury*,† and *Lugg v. Lugg*,‡ were afterwards approved of, they did not receive a final sanction till the case of *Christopher v. Christopher*.§ It is true that a very able lawyer dissented from the decision in that case, lest the Statute of Frauds should be thereby repealed; and having a jealousy in introducing the civil law, he resisted the force of those arguments, which found their way to the other judges, who determined that case. And I am glad that those judges did over-rule his opinion; because no person would wish that his family should be put into such a situation as to be deprived of all provision, and that the secondary objects of his bounty should be preferred to his immediate children. But without going into all those cases, it may now be taken for granted, because it has been solemnly decided, that marriage and the subsequent birth of a child amount to a revocation of a will made before marriage. Perhaps the foundation of that principle is not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of his family. If those cases were referable to the head of a subsequent intention, the principle would be considerably distressed by the argument of Mr. B. Perrot in *Christopher and Christopher*, and by the circumstance of a conception not communicated to the husband, or of a miscarriage subsequent to his death; the latter of which might have some influence on *the intention of the devisor, and yet would not operate as a revocation; and the former would have that effect, though it could not influence the intention. But, without considering on what those cases professed to go, it is sufficient now to say that the rule is too clearly established to be shaken; and the single question here is, Whether the rule, which has been incorporated into our

1792.

DOE

v.

LANCASHIRE.

[*59]

† 2 Show. 242.

‡ Salk. 592.

§ In the Court of Exchequer,

July 6, 1771, Dougl. 35; 4 Burr.

2171, 2182.

1792.
DOE
v.
LANCASHIRE.

law, subject to the exceptions mentioned by Lord MANSFIELD in *Brady v. Cubitt*,* extend to the case of a subsequent marriage and the birth of a posthumous child? It being admitted in the argument that this rule was borrowed from the civil law, it is necessary to resort to the civil law to examine its extent. By referring to that law, I do not wish to import into our courts all its decisions on testamentary acts: those respecting the *testamentum inofficiosum* have been frequently and very properly rejected by the courts of law; but those respecting revocations by a subsequent marriage and birth of a child have been incorporated into our law. In Justinian,† we find this passage: “Posthumi quoque liberi vel hæredes institui debent vel exhæredari: et in eo par omnium conditio est, quod et filio posthumus, et quolibet ex cæteris liberis, sive feminini sexus sive masculini, præterito, valet quidem testamentum; sed postea, agnatione posthumi sive posthumæ, rumpitur, et eâ ratione totum infirmatur: ideoque si mulier ex quâ posthumus aut posthuma sperabatur, abortum fecerit, nihil impedimento est scriptis hæredibus ad hæreditatem adeundam.” And Vinnius commenting on this law says,‡ “Hinc petenda ratio, cur posthumus præterito placeat testamentum ab initio valere; nimirum quia fieri potest, ut non nascatur, abortum faciente muliere, ex quâ sperabatur. Atque hactenus ergo nec pro nato habetur; frustra que objicitur eum qui in utero est, quoties de commodo ejus agitur, pro eo qui in rebus humanis sit, haberi. Nullum enim hic incommodum sentit, cum statim ut editus est testamentum rumpat, et regula ista sic temperanda est si modo postea nascatur, tunc enim fictione juris nativitas retrahitur.” Then it is clear both in the text, and in the commentary on it by one of the most able civilians, that if the wife be pregnant, and a posthumous child be afterwards born, the will is utterly destroyed. And this confirms the idea that these decisions do not proceed on the intention of the party, but on a tacit condition annexed to the will itself when made. Our law also takes notice of posthumous children in a variety of cases. Under the Statute

* Dougl. 31.

† Vin. lib. 2, tit. 13.

‡ Just. lib. 2, tit. 13, *De posthumis*.

of Distributions posthumous children are entitled to take with those born during *the parent's lifetime. In Co. Litt. it is said, if a father die, leaving a daughter, and his wife be *ensient*, and a son be afterwards born, though the lands descend to the daughter in the interim, yet the instant the son is born the descent shifts to him. So too under the statute 10 & 11 W. III. c. 16, the law considered them as entitled to take: but the misfortune was, that if there were no trustees to preserve the contingent remainders, that, which was good in its inception, might be afterwards defeated by the child not being *in esse* when the particular estate dropped: but that was founded on technical reasoning, because the particular estate failed before the remainder could take effect. It is part of the history of that law that the judges had before held such an objection fatal, because a contingent remainder must take effect during the preceding particular estate, or *eo instanti* that it determines; though the House of Lords reversed that judgment against the opinion of all the judges; but afterwards, by way of saving their own honour, passed the statute in question, not declaring what the law was, but enacting that in future every such child should take in the same manner as if born in his father's lifetime, though there should be no estate limited to trustees to preserve the contingent remainders. There is no necessity, however, to pursue this point farther, it being sufficient for the decision of this case to see how far our predecessors have gone in judging upon this subject. They have determined that marriage and the birth of a child may operate as a revocation of a will made before; and by adverting to the civil law, from whence this rule was borrowed, we find that it equally extends to the case of a posthumous child: the text of the civil law says that it does, and so does the commentary on it; and to this nothing is opposed. For these reasons therefore, standing on former decisions, and not extending them beyond the rule established and incorporated into our law, I am of opinion that the plaintiffs are entitled to recover.

In forming my opinion, I disclaim paying any attention to the declarations of the husband, because letting in that kind of evidence would be in direct opposition to the Statute of Frauds,

1792.
Doe
v.
LANCASHIRE.
[*60]

1792.
DOE
v.
LANCASHIRE.
[*61]

which was passed in order to prevent anything depending either on the mistake or the perjury of witnesses. But when the Act intended to guard against frauds and *perjuries, it left the courts at liberty to take into consideration those circumstances which are not liable to prevarication.

BULLER, J. :

Some points have been fully established ; 1st. That an alteration of circumstances may amount to a revocation of a will of lands ; 2ndly. That marriage and the birth of a child are such circumstances as will produce that effect ; and, 3rdly. That such a revocation is by presumption of law ; and implied revocations are not affected by the Statute of Frauds. Then the only question which remains to be discussed is, Whether a child *en ventre sa mere* be or be not in the same situation as a child actually born. Though, when I say this, I do not forget the declarations which are stated in this verdict ; to which I entirely concur with my Lord that no regard is to be paid. If there be any revocation at all of this will, it is so by presumption of law, independently of express declarations. But when these declarations were used, in argument at the bar, to prove that the devisor did not intend to provide for his child, I think that the question was not accurately stated ; it should have been stated thus, “ Whether by those he meant to revoke the will.” I do not think it necessary that it should appear to have been the devisor’s intention to provide for the child : the law says that, unless an intention appear that the will should stand, the circumstances of marriage and having a child operate as a revocation of the will.

Then the great question is, Whether a posthumous child is considered in the same situation as one born during the parent’s life ? On this head many cases have been cited to shew that there is no distinction. Without going through them again, I will only add one to them, in 1 Ves. Sen. 85 ; where on a bond given on marriage to raise 2,000*l.* for such child or children of the marriage as should be living at the death of the father or mother, a posthumous child was held entitled to take as coming within the description. And indeed all the cases cited, as well

as that of *White v. Barber*,† establish this point, that there is no distinction between a child *en ventre sa mere* and one actually born. Different comments having been made on the supposed facts of the case of *Brown v. Thompson*, I was induced to look into the Register-book, where it does not appear that the child was born during the parent's life: and as it does not so appear on the face of the proceedings, considering the authority of the book in which that case is contained, I think we must take *it that the child was not actually born. The first observation to be made on that case is, that the case was first heard before the MASTER OF THE ROLLS, who decreed a revocation of the will; though that decree was afterwards reversed by Lord Keeper WRIGHT, who was of a different opinion from the peculiar circumstances of that case. The decision at the Rolls then was fully equal to the other: but, without considering the weight of names, I rather look to the reasons given for the several judgments; and I think that those given at the Rolls were the most sound. In the register it stands thus; the bill states that the will was made 3rd of March, 1692, by which J. Brown devised to his cousin E. Close in fee; that soon after he married; and soon after he died; the answer states that, after making his will, he married E. Close, and had issue by her the defendant: but there is no date to either of those events either in the bill or answer. The expressions relied upon at the bar to prove that the child was born in the father's lifetime, are, "having a child," and, "left a son;" but both those are consistent with the idea of there being only a posthumous child. If that circumstance made all the difference in the cause, that should have been stated by the plaintiff: but nothing of that kind was introduced in the cause. But there was another circumstance in the case, on which (I think) Lord Keeper WRIGHT founded his decree, and which ought not to have influenced his decision; and that was, that after the devisor's death the wife devised to the posthumous son, and died before the suit was commenced. The Lord Keeper was clearly of opinion, "That alteration of circumstances may be a revocation of a will of lands as well as of a personal estate; and that notwithstanding the Statute of Frauds and Perjuries,

1792.

DOE

v.

LANCASHIRE.

[*62]

† 5 Burr. 2708.

1792.
DOE
v.
LANCASHIRE.

[*63]

which does not extend to an implied revocation ; but (he added) no such alteration appears here, for no injury is done to any person ; and those are provided for, whom the testator was most bound to provide for." The ground of that judgment, therefore, was, "that no injury was done to any person : " but that does not apply to the argument, whether an alteration of circumstances should or should not operate as a revocation of the will of the first devisor. It was not a sufficient ground on which a Court should decide on the validity of the will, that the person benefited by that decree would have taken if the will had been revoked. The subsequent devise by the mother to the child could not affect the question respecting the validity of the father's will ; for, *according to that mode of reasoning, if the wife had devised to any other person, the determination of the Lord Keeper would have been different. On the whole, I think we must take it that in that case the child was not born during the devisor's life ; if so, the opinion of the Master of the Rolls goes the full length of deciding the present case ; and I agree that that opinion is sound law.

GROSE, J. :

Although this is a question of very great importance, it seems to me to be reduced to a very narrow compass. It is not whether marriage and pregnancy amount to an implied revocation of a will of lands made before marriage, but whether marriage and the subsequent birth of a child will have that effect. The law presumes that the devisor intended, or rather, as Lord KENTON has said, there was a tacit condition annexed to the will, that in such an event the will should not stand. This depends on another question, Whether against the express words of the Statute of Frauds the law will in such a case imply a revocation of a will of lands ? On that head I cannot but express a doubt, Whether it is not to be lamented that the letter of that statute has not been more strictly adhered to : if this were *res integra*, I should have great difficulty in determining that such a case was not within the Statute of Frauds. But it is now too late to doubt whether in the case of marriage and the birth of a child during the father's life, the law presumes a will of lands made

before that marriage to be revoked. That point has been solemnly decided; and the only question here is, Whether in point of law, justice, and good sense, there be any difference between that case and the present? I know of no argument, founded on law and natural justice, in favour of the child who is born during his father's life, that does not equally extend to a posthumous child. And I think that, when once the law has interfered and presumed in favour of one child, it would stop far short of justice if it did not raise the same presumption in favour of the other. The presumption in favour of the child who is actually born is, that at the time of the father's death he could not intend that the will should take effect, or rather, that at the time when he made the will he did not intend that it should stand in the event of his afterwards marrying and having children: Then the law which makes that presumption in favour of a child born in the parent's life, must make the same presumption in favour of one born afterwards. The objection which has been made against this is, that the will speaks from the devisor's death; and that it must be decided whether or not at that moment it *be a valid will. I agree that it does speak from that time; but the instant the child is born, he is considered, by retrospect, as born during the parent's life. For this opinion I refer to the civil law, as was done in *Christopher v. Christopher*, and the other cases which are founded on that law. Vinnius says, "Si modo postea nascatur, tunc enim fictione juris nativitas retrahitur." The whole passage read by my Lord from that commentator fully explains this doctrine. And in another learned writer on this subject, Domat, I find this passage †: "The children who are not as yet born when their fathers die, whom we call posthumous children, and likewise those who are taken out of their mother's womb, she being dead before she was brought to bed, are reckoned in the number of children who succeed. And although they are not as yet born when the successions which they are to inherit fall to them by the death of their father, mother, or others their relations, yet they belong to them upon condition that they shall be born alive, and they are considered as heirs already before their birth."

1792.

DOE

v.

LANCASHIRE.

[*64]

† Dom. 2, b. 2, tit. 1, s. 1, par. 6.

1792.
 DOE
 v.
 LANCASHIRE.

From hence it is evident that a posthumous child must be considered in the same situation, and entitled to the same benefits, as a child born during the life of the parent. The case mentioned by my brother BULLER, and that of *Hale v. Hale*, are also strong to this point. In opposition to this no one case has been cited. It seems to me, therefore, that it would be contrary to law, justice, good sense, and every principle on which the doctrine of wills both in ecclesiastical and common law courts is founded, to determine that there is any difference in this respect between a child actually born and a posthumous child.

Judgment for the plaintiff.

1792.
 Nov. 23.
 [64]

WELLINGTON v. ARTERS.

(5 T. R. 64—65.)

Proceedings in an action stayed, it being sworn by the defendant, and not denied by the plaintiff that the debt was under 40s.† [3 B. & P. 617.]

DAUNCEY on a former day obtained a rule calling on the plaintiff to shew cause why the proceedings in this cause should not be stayed, on an affidavit, by the defendant, that the debt did not amount to 40s.

[*65] *Baldwin* now, in shewing cause, produced an affidavit, which did not deny that so much was due, but was evasive; and he urged the danger of making such a rule as the present absolute; for that it would be either compelling the plaintiff to *swear positively to a debt, the amount of which was perhaps uncertain in its nature, and upon the *quantum* of which it was the province of the jury to decide, or to relinquish his claim in this Court; and that this Court had never yet stayed the proceedings in any cause unless it appeared upon the record, or was admitted by the plaintiff or his attorney, that the demand was under 40s. But

† But the Court will not order the proceedings to be stayed on this ground, unless the cause can be tried in the inferior Court. *Tubb v. Woodward*, 6 T. R. 175; and *Busby v. Fearon*, 8 T. R. 235.

The Court said that the Court of Exchequer always interfered in such cases, though the demand did not appear on the record to be under 40s.; and that this Court had lately * interfered on the same principle, where it appeared that the debt was of that nature. And that, as it was expressly stated by one party, and not denied by the other, that such was the present case, they ought to stay the proceedings. And accordingly

The rule was made absolute.

1792.
WELLINGTON
v.
ARTERS.

THE KING v. WHITWELL.

(5 T. R. 85—87.)

1792.
Nov. 27.
[85]

There must be an user as well as a claim of a franchise in order to found an application for an information in nature of a *quo warranto*. Stating that the defendant who was elected to an office had tendered himself to be sworn in is not sufficient.

BOWER and *Dayrell* shewed cause against a rule for an information in nature of a *quo warranto* against the defendant for claiming to be sheriff of Coventry. They stated as a decisive objection that he had not been sworn in, or done any act of office whatever.

[*Erskine*, *Willis*, and *Reader* were heard in support of the application.]

BULLER, J. † :

[86]

No instance has been produced, in which the Court have granted an information in nature of *quo warranto*, where the party against whom it was applied for has not been in the actual possession of the office. No such instance can have happened; and all the cases cited are the other way. In *Rex v. Ponsonby*, ‡ the Court expressly held that there must be an user as well as a claim in order to found such an application. This is evident

* *Kennard v. Jones*, 4 T. R. 495, reported p. 447, *ante*. See also *Lowe v. Lowe*, 1 Bing. 270; *Stuart v. Cawse*, 5 C. B. (N. S.) 377.

† Abs. Lord Kenyon, Ch. J.
‡ 25 Geo. II. cited in Bull. N. P. 211; reported also in Sep. 245, 247.

1792.
THE KING
v.
WHITWELL.

from the very nature of the case. The defendant does not now claim to exercise his office of sheriff; he merely claims a right to take the oaths of office, in order that he may be invested with that corporate character. But until the oaths have been administered to him, he does not claim to exercise the office. It has been said that the Court ought to grant this application, because it is the only remedy; for that under these circumstances they cannot grant a criminal information or a mandamus: whether they can interfere in the one or other of those modes must depend on the particular circumstances of the case, upon which they will decide when it is regularly brought before them. For the present, it is sufficient to observe that the Court have granted criminal informations against persons for not taking upon them offices to which they have been legally elected. I remember a case of *The King v. Brown* tried before me at Liverpool upon that very ground. But certainly the Court cannot entertain such an application as the present, no user by the defendant having been pretended.

GROSE, J.:

This is an application against the defendant for claiming to exercise the office of sheriff. The answer is, He makes no such claim. This information issues on the supposition of some [*87] usurpation on the crown: but how can a man be said *to usurp an office, when he is not in possession or in the exercise of it.

Rule discharged.

1792.
Nov. 28.

[*89]

THE KING v. JAMES WINTON.

(5 T. R. 89—92.)

Return to a *habeas corpus* "I had not at the time of receiving this writ, nor have I since had the body of A. B. detained in my custody, so that I could not have her, &c." was held a bad return; and an attachment granted against the party who made it. An attachment may be granted for making an insufficient return to the first writ of *habeas corpus*, without issuing an *alias* and a *pluries* writ.

A WRIT of *habeas corpus* having been directed to the defendant to bring up the body of Margaret, the wife of J. Greygoose, the

following return was made: "I had not at the time of receiving this writ, nor have I since had the body of the within-named M. Greygoose detained in my custody, so that I could not have her before the within-named W. H. Ashhurst as within I am commanded." The affidavit of J. Greygoose, on which the writ issued, stated that his wife was in June, 1790, seduced by the defendant, with whom she continued to live until the month of May last, when she returned to her husband; that about three days afterwards in consequence of a letter written by the defendant, threatening to publish her conduct in case of a refusal to go back again to him, she was induced to go back to the defendant, who (as the deponent believed) detained her by threats, and with whom she was now living in a state of adultery, but that she was desirous of returning to her husband.

The above return having been filed, a rule was obtained, calling on the defendant to shew cause why an attachment should not issue against him for making an insufficient return, which was now opposed by

1792.
THE KING
v.
WINTON.

Marryat on three grounds; first, that under the circumstances of this case the writ of *habeas corpus* should not have issued; 2dly, that this was a good return in substance; and, 3dly, if not a good return, that an attachment ought not to be granted on account of a mere slip in the return to the first writ of *habeas corpus*, but that an *alias* and a *pluries* writ should first issue. First, the prosecutor, *having entered into articles of separation† with his wife, has now no control over her. In *R. v. Mary Mead*,‡ where the wife was brought up on a return to a *habeas corpus*, sued out at the instance of the husband, the Court held such an agreement as this "to be a formal renunciation by the husband of his marital right to seize her, or force her back to live with him;" and the husband was ordered not to molest her on her return home to her friends. 2dly, Though the last words "could not have her before," &c. are not so accurate as

[*90]

† This argument was founded on an affidavit made by the defendant, in which the execution of the deed by the wife was sworn to; but it was not sworn positively that the

husband had executed it, but merely that it had been sent to him in the country, and that the defendant believed he had executed it.

‡ 1 Burr. 542.

1792.
THE KING
v.
WINTON.

those usually inserted in returns, “cannot have,” &c. still the former part is of itself a sufficient return. In *R. v. Sir R. Viner*,† the return to a *pluries habeas corpus* “nullam habeo talem personam in custodiâ meâ, nec habui die impetrationis hujus brevis, vel unquam postea,” was adjudged to be a bad return, because the defendant might have had the person *die impetrationis* of the first writ, though not of that writ, the *pluries*. But that case shews that the word “*habui*” in the præterite tense is good. 3dly, Even if the return be insufficient, an attachment should not issue immediately, but an *alias habeas corpus* awarded; as was done in a case mentioned in 3 Bac. Abr. 11.

Bower and *Burrough*, in support of the rule, observed, in answer to the first objection, that the facts in support of it failed, it not being sworn that the husband had executed the articles of separation. As to the second ground; that this return was not drawn according to the usual and regular form, which is, that the person, to whom the writ is directed, “has not the party in his possession, custody, or power.” That it would be dangerous to depart from the established form in a point of so much importance to every individual in the country. That the affidavit in support of the rule explained the reasons why the return was drawn in this evasive manner. And that no inference in favour of this return could be made from that in *R. v. Sir R. Viner*, because that return was held to be bad on another ground. On the third point; that an attachment was the proper and regular mode of proceeding in the case of an insufficient return to the first writ, and peculiarly so in the present case, where the circumstances, disclosed by the affidavits, *manifestly evinced an attempt on the part of the defendant to impose on the Court.

[*91]

BULLER, J.† :

I will first dispose of the last objection against the attachment, because it is of more general consequence than the two others. Notwithstanding what is to be found in some of the old books on this subject, it has been long settled that the Court will require a return to be made to the first writ of *habeas corpus*; and it is

† 2 Lev. 128, 129.

† Abs. Lord Kenyon, Ch. J.

of infinite importance to every individual in the kingdom that we should insist on a return being made to that writ, without issuing an *alias* and a *pluries*. If the first writ be not obeyed, an attachment must issue immediately. Then it was argued on the authority of a case in 2 Lev. that this is a sufficient return ; but I am of opinion that that case is by no means an authority to support this return. It is to be observed that the Court gave no opinion on this point, and for this reason, because there was another objection to the return, which made it unnecessary to consider the effect of the other words of it. But the words there used are widely different from those used in this case ; there Sir R. Viner returned that “ he had no such person in his custody, nor had he on the day of issuing that (*pluries*) writ, or afterwards.” But here the return is, “ I had not at the time of receiving this writ, &c. nor have I since had the body, &c. detained in my custody,” &c. This is an equivocal return ; the defendant does not deny having the party, he only denies the detaining of her ; but we must enquire, when she is brought up, whether or not she be detained. As to the other ground : if this case turn out on farther investigation to be like that in Burrow, I am strongly inclined to think that this would be an answer to the writ. But that is not at present made out : and if the affidavit on the part of the prosecution be true, that the wife is desirous of returning to her husband, and is prevented by fear, or by the threats of the defendant, this case is distinguishable from that cited.

1792.
THE KING
v.
WINTON.

GROSE, J :

The Courts always look with a watchful eye at the returns to writs of *habeas corpus*. The liberty of the subject so essentially depends on a ready compliance with the requisitions of this writ, that we are jealous whenever an attempt is made to deviate from the usual form of the return. The general form is “ that the party has not the person in his possession, custody, or power : ” that has not been adopted in this case, but another, and that an equivocal one, substituted in its *place, “ detained,” &c. omitting the words “ power and possession.” What the defendant means by the words “ detained ” I know not ; but it does not satisfy me that the woman is not under the defendant’s control. As to the

[*92]

1792.
THE KING
v.
WINTON.

articles of separation, it is not sworn positively that they were executed by the husband; that point rests merely on the belief of the party. If really the deed had been executed by the husband, the subscribing witness, or some other person, should have sworn to the fact. But even if the deed were executed by all the parties, still, for the reasons given by my brother BULLER, I think that the writ ought to go, that we may have an opportunity of enquiring further into the foundation of the matter disclosed in the husband's affidavit. And on the great ground, I am clearly of opinion that an attachment ought to issue immediately against the defendant.

Rule absolute.

K. B. HILARY TERM.

1793.
Jan. 25.
[104]

ROE, ON THE DEMISE OF CROW, v. J. BALDWERE
AND ELIZABETH HIS WIFE, AND J. ANCELL
BELLAMY.

(5 T. R. 104—112.)

If a tenant in tail by purchase under a settlement made by his ancestor *ex parte maternâ* suffer a recovery, and declare the uses to himself in fee, he takes the fee as a purchaser, descendible to his paternal heirs. If tenant in tail by descent from maternal ancestor suffer a recovery, and declare the uses to himself in fee, the estate will descend to the heirs *ex parte maternâ*; whether it be copyhold or freehold.

THIS was a special case reserved on the trial of an ejectment for certain freehold and copyhold premises at Moulton in Lincolnshire. John Younger, being seised in fee of all the premises in question, by will duly executed, dated Sept. 3rd, 1784, devised (*inter alia*) eighteen acres parcel thereof, and of which seven are freehold and eleven copyhold, to S. Atkinson in fee; and certain other premises, partly freehold and partly copyhold, to S. Atkinson for life; remainder to E. Waterfield, the devisor's sister, in tail. The devisor died in 1787, leaving S. Atkinson and E. Waterfield; whereupon S. Atkinson entered

1793
 ROE
 v.
 BALDWERE.

and was seised according to the devises aforesaid, and on September 29th, 1748, by her will duly executed, devised all the lands, &c. given to her in fee by J. Younger's will to trustees for the use of E. Crow, daughter of E. Waterfield for life, remainder to trustees to preserve, &c. remainder to the first and other sons of E. Crow in tail; remainder to the daughters in tail; remainder to the right heirs of J. Younger. In 1750 S. Atkinson died; E. Waterfield being likewise then dead, and having left two daughters, the aforesaid E. Crow, and A. Read, of whom the former, E. Crow, died before S. Atkinson, leaving one child Catherine the wife of W. Bowker; the latter (Ann Read) survived S. Atkinson. Upon the death of S. Atkinson, C. Bowker entered upon a moiety of the lands devised to E. Waterfield in tail, as above-mentioned, and also upon the eighteen acres devised by S. Atkinson's will. In 1762 C. Bowker with her husband William Bowker duly suffered common recoveries both of the freehold and copyhold premises, as well of the moiety which she took under the will of J. Younger as co-heir (with Ann Read) of E. Waterfield, as of the eighteen acres which she took under the will of S. Atkinson, as daughter of E. Crow; and as to the freehold parts of the estate the uses of the recovery were declared to W. Bowker and C. his wife for their lives, and the life of the survivor; remainder to Catherine in fee; and as to the copyhold C. Bowker was admitted in fee on the surrender of the recoveror; and afterwards, at the same Court, W. Bowker and C. his wife duly surrendered the premises to themselves for their lives and the life of the survivor, with *remainder to the right heirs of Catherine; and W. Bowker and his wife were admitted accordingly. C. Bowker and her husband are dead without issue. J. Crow, the lessor of the plaintiff, is the heir *ex parte paternâ* of C. Bowker. The defendants are her heirs *ex parte maternâ*. The questions reserved were, first, Whether the plaintiff were entitled to recover the freehold and copyhold premises, or either of them, which passed to C. Bowker, under the will of J. Younger? And secondly, the like, as to the premises which passed to C. Bowker under the will of S. Atkinson.

[*105]

Perceval for the plaintiff relied on the case of *Martin d.*

1793.

ROE

v.

BALDWIN.

Tregonwell v. Strachan,* 1 Wils. 2, 66, and 4 Bro. Parl. Cas. 486, as decisive of the second question stated; that case having determined that where a tenant in tail by purchase with a reversion in fee by descent, both *ex parte maternâ*, suffers a common recovery, the old use is gone, and it descends to the paternal heirs. With regard to the freeholds (comprised in the first question stated) of which C. Bowker was seised as tenant in tail by descent, he admitted that the defendants were entitled, on the authority of *Abbot v. Burton*,† it having been there decided that the course of descent was not altered by the recovery suffered by a tenant in tail by descent *ex parte maternâ*; but he denied that this rule extended to the copyhold premises, because the reasons which govern the decision as to freeholds were not applicable to copyholds. * * *

[106]

Sutton was proceeding to argue for the defendants on the controverted point, relating to the copyholds; but the Court having a decided opinion on the subject in his favour, stopped him.

[107]

LORD KENYON, Ch. J. :

This case has probably arisen in consequence of the inaccurate manner in which the case of *Martin v. Strachan* is reported by Sir J. Strange.‡ (His lordship then referred to a MS. note§ of

* See report in note to judgment, *infra*.

† Salk. 590.

‡ 2 Stra. 1179.

§ The Lord Chief Justice obligingly furnished us with the following note:—

[107]

“MARTIN on the demise of TREGONWELL, Esq., v. STRACHAN and others, Hil. 16 Geo. II.

“After two arguments, the opinion of the Court on the special verdict in this case was delivered to the following effect, by

“LEE, Ch. J. :

“The material question is, Whether the estate, of which Jacob Banks

died seised in fee, is to descend to the lessor of the plaintiff, as heir to Jacob Banks *ex parte maternâ*; if not, the possession of the defendant is a sufficient defence as against the plaintiff's demand; for the plaintiff must recover upon the strength of his own title, and not by the weakness of the defendant's title. Jacob Banks being tenant in tail by purchase under a marriage settlement made by his ancestors, with remainder in tail to Rooke and Ash his relations, *ex parte maternâ*, with remainder in fee to himself by descent from his mother, makes a tenant to the *precipe* by lease and release, and then suffers a common recovery; and by

that case, which he said was more *full and correct than any in print.) The operation of a fine and a recovery on questions of

the same deed declares the use to himself and his heirs; and afterwards dies seised intestate, and without issue.

“The rule of descent is known, and will be agreed. If a man seised as heir on the side of the mother make a feoffment in fee to the use of himself and his heirs, the use being a thing in trust and confidence shall ensue the nature of the lands, and shall descend to the heir on the part of the mother. Co. Lit. 13, a; 3 Lev. 406; *Godbold v. Freestone*. And it will be the same if the limitation be by fine and recovery; it is still the ancient use; and there is no difference whether upon the conveyance of an estate any part of the use result by implication of law, or whether it be reserved by express declaration to the party from whom the estate moved; and so is the case of *Abbot v. Burton*, Salk. 590. But this rule holds only where lands come by descent, and not where a person takes by purchase. And therefore if a man have issue a son and dieth, and the wife also dieth, lands are letten for life, remainder to the heirs of the wife, the son dieth without issue; the heirs on the part of the father shall inherit, and not the heirs on the part of the mother; because it vests in the son as a purchaser. 1 Inst. 13, a.

“Now here it is observable that J. Banks took an estate tail as a purchaser *per formam doni* (i.e.), under the settlement made by old John Tregonwell on the marriage of his daughter Luttrell in 1680; and this estate tail in Jacob Banks preceded the estates to Ash and Rooke, and also preceded the remainder in fee. The question then is, Whether Jacob Banks, who thus took as a purchaser under a settlement by his

maternal ancestor an estate-tail precedent to the remainders in tail, and also precedent to his own reversion in fee, and suffered a common recovery, and thereby made himself tenant in fee, is not to be considered in the same manner as to any descendible quality as if he had originally taken by purchase an absolute fee-simple under a settlement made *ex parte maternâ*? And in order to determine this, it will be proper to consider, 1st, How conditional fees stood at the common law? 2ndly, What alterations were made by the statute *De donis*? And lastly, What is the effect and operation of a common recovery?

“And first; at common law all inheritances were fee-simple, absolute, fee-simple conditional, or qualified fee. The donor had only a possibility of having the lands again; for the tenant of lands intailed before the statute had only a fee-simple conditional. If, before issue had, he had made a feoffment in fee, the donor should not have entered for the forfeiture; but this feoffment had barred the future issue; and after issue had, the condition was performed to this purpose, that he might have aliened, and thereby have barred the donor and his heirs from all possibility of reversion for default of issue: and as to the heirs of his body, he might have barred them as well before issue had as after. By having issue, the condition was performed for three purposes; to alien, to forfeit, and to charge: but the course of descent was not altered by having issue.

“As to the alteration made by the statute; this power of aliening was disliked at the time of making the statute *De donis*, and, therefore, the statute only took away that power:

1793.

ROE

v.

BALDWERE

[*108]

[108]

1793.

ROE

c.

BALDWERE.

[*109]

this kind is extremely different. If *a tenant in tail, with a reversion in fee to himself, levy a fine, the effect of that on the

but the estate was left to descend as before; and that the donee might have no power to alien, the judges held the donee should not have a fee-simple, and so made divided estates, and created a particular estate in the donee, and the reversion in the donor: so as where the donee had a fee-simple before, he had by this act but an estate tail; and where the donor had but a possibility before, now, by construction of this act, the donor had a fee-simple expectant upon the estate tail, which we call a reversion. So, by this division of the estates, the donee before issue had, or after issue, could not bar or charge his issue, nor for default of issue the donor or his heirs; and this learning appears in Co. Lit. 19, and 2 Inst. 334; by which means a perpetuity was created: and then when this great inconvenience was discovered, the judges found it absolutely necessary to give tenants in tail a power of aliening by recovery. Thus common recoveries were introduced, and they were afterwards taken notice of by several Acts of Parliament, as by the Act of 7 H. VIII. c. 4; to enable recoverers to avow, &c. 21 H. VIII. c. 19. And in *Mary Portington's* case, 10 Co. 38, as Lord Coke says, that the judgment in 12 Ed. I. was no new invention but approved of by the resolutions of the sages of the law; who, perceiving what contentions and mischiefs had crept in to the disquiet of the law by these fettered inheritances, upon consideration of the said Act, and of the former exposition of it by the sages of the law, always after the said Act gave judgment that in such case, (viz.), of a common recovery, where there is a judgment against the tenant in tail, and another judgment

against the vouchee to have in value, the estate tail should be barred;" and says my Lord Coke, fo. 38, b.; so that where the Act of W. II., "Quod finis ipso jure sit nullus, we may say, quod quoad communem recuperationem, &c., actus ipse ipso jure sit nullus." And in truth that is the case; for now the donee in tail by suffering a common recovery is enabled to pass an estate to another, and his heirs, that is an absolute fee-simple.

"This leads me to consider the effect and operation of a common recovery. And this is well stated in the case of *Hunt v. Gatley*, Moor, 155, 6. There it appears that remainders by the common law and before the statute *De donis* were but possibilities of reverter, and after the statute remained of so base account that the remainder-man should not be received, nor compel the tenant to attorn. That entails, being the common grievances of the realm, occasioned the making of the statute of Fines to bar the issue, and the invention of recoveries to bar the remainders; and the reason of a common recovery barring the remainder is, because he in remainder is enabled to enjoy the recompence. And this reason has had allowance always by the judges since the first commencement: and the issue who is inheritable to the recompence shall be barred thereby, but not the lessees, grantees of rent, or connueses of statutes, or parties to other incumbrances of the tenant in tail himself, who suffers the common recovery; for they may falsify; but the grantees of the remainder cannot falsify the recovery suffered by the tenant of the freehold; yet they shall be barred by his recovery, because they claim under the remainder-man

estate-tail is creating a base fee; and that *becomes merged in the other fee, and lets in all the incumbrances of the ancestor,

who is entitled to the recompence; so that a common recovery may be considered in several respects, as to a tenant in tail, and as to the remainder-man. As to a tenant in tail, it is a conveyance by consent; as to the remainder it is a bar involuntary. As to a tenant in tail, it is a grant in the *per*; as to the remainder, it has the credit of a recovery upon title; and therefore tenant in tail alone limits all the uses upon such recovery, and he in remainder *volens* is bound; and if a common recovery is suffered without consideration, this in judgment of law, without other proof, is to the use of him who suffered the recovery, if nothing is proved to the contrary, as appears in 9 Co. 11, *Downman's* case. This I think fully explain the nature of a common recovery; and shews that the recoveror has an estate in fee, discharged of all incumbrances made by the remainder-man. And when the tenant in tail suffers a common recovery, and dies without issue, a rent-charge granted by the remainder-man is gone by the recovery, although the estate-tail was expired; because he, who is in, is in under the entail; and so it appears in Poph. 5, 6. But it was urged at the bar (and here I think the stress of the case lies for the plaintiff), that the estate-tail and fee being in the same person in the present case, the recovery will operate as a bar and extinguishment of the estate-tail, and consequently as a revival or giving life to the reversion in fee. And to warrant this was cited the case of *Symonds v. Cudmore*, 1 Salk. 338, Carth. 258, Skin. 339, 1 Show. 370, 4 Mod. 1, which case is thus: tenant in-tail, remainder to himself in fee, levied a fine with proclamations; in which case it was resolved

that the fine with proclamations not only barred but extinguished the estate-tail as much to all intents as if tenant in tail had died without issue; for otherwise the conusee must have two distinct estates in fee, viz., a base fee, determinable upon the death of tenant in tail without issue, and also an absolute fee; which is very absurd; and therefore the greater fee, which is the absolute, shall swallow up the base fee, and shall be consolidated into one entire estate. Now here it is to be observed, that the tenant in tail as such passed a fee to the conusee in that case by the fine, as the Court there held, without any regard to the reversion in fee; but this was a base fee or a qualified fee, determinable upon the death of the tenant in tail without issue; and what that base or qualified fee is, is well explained by Lord HOLT, in the case of *Machel v. Clarke*, Salk. 619, where he says, that 'if a tenant in tail covenant to stand seised, or by lease and release, or bargain and sale, convey to another and his heirs, it is a base fee, not determined nor determinable till the entry of the issue: for before the statute *De donis* he had a fee-simple; and the statute does not alter the nature of the estate, but restrains the power of alienation; and therefore, as he might before the statute, so he may since. The statute only makes it voidable.' He says further, that 'he has the whole estate in him, and therefore must be able to divest it; and so (he said) was *Seymour's* case, 10 Co. 96.' The difference then between the case of *Symonds v. Cudmore* and this present case, arises from the different operation of a fine and a common recovery. A fine operates as an extinguishment of the estate-tail, and passes a base or a

1793.

ROE

v.

BALDWERE.

[*110]

[109]

1793.

ROE

v.

BALDWERE.

which has frequently happened in practice from such a person being ill advised to levy a fine instead of suffering a recovery.

qualified fee. And that fine in the case of *Symonds v. Cudmore*, was in the nature of a merger or consolidation of the two fees; the reversion in fee being there let in and taking place, and was the same, and was there so considered, as if tenant in tail had been dead without issue. But a common recovery does not operate in that manner; for a common recovery passes not a base fee, but a full, absolute, unlimited, and rightful fee, and is to be considered as the proper conveyance of a tenant in tail, and passes the fee in the same manner as the fee is passed by a feoffment of tenant in fee. And so was the opinion of Mr. Justice TRACY, as he delivered it at the Delegates in *Lord Derwentwater's* case. And the Act for forfeiture of estates tail in case of treason seems to consider the matter in the same light; for by the statute 26 H. VIII. c. 13, tenants in tail forfeit the whole fee; so that the Parliament has considered tenant in tail as owner of the whole fee. 1 H. H. P. C. 240. And to say that the estate-tail is extended and enlarged by a common recovery suffered by tenant in tail is an inaccurate way of speaking; and so it was treated by Mr. J. TRACY in the case of *Lord Derwentwater*; for what is called an estate-tail is still a fee conditional as before the Act, and the same estate in the eye of the law hath continued. And that it is considered in the nature of a fee is proved from hence, that such tenant may exchange with tenant in fee. Salk. 620. 1 Rol. Abr. 813, pl. 7, 10, 11, is to the same purpose. So that the true legal sense of this matter is that by the statute *De donis potestas alienandi* is taken away, which gave the judges occasion to call the limitations after the estates-tail by the

names of remainders and reversions, which were before only possibilities; but such *potestas alienandi* was restored to the tenant in tail by the common recoveries; for the protection of the statute *De donis* was thereby taken off, and the remainders and reversions were afterwards [no] more than possibilities again; and what were called possibilities were of little or no consideration, and were not so much as assets in the hands of the heir. So that what passes by the recovery does not come out of the remainder or reversion, but out of the estate-tail. In common recoveries the recoveror can have the estate only as he that suffered the recovery had it; and so long as any comes in by that recovery, he comes in in continuance of the estate-tail, and coming in so he is liable to all the charges of tenant in tail. And the reason why a rent granted by a remainder-man shall be barred by the tenant in tail's recovery is, because the recoveror comes in in the continuance of that estate, that is not subject to that rent, but is above all these charges. At common law upon an estate-tail (which was a fee-simple conditional) a remainder could not be limited over, because but a possibility; but the statute *De donis* makes an estate-tail; and a recovery is an inherent privilege in that estate which was never taken away by the statute. The law takes it as a conveyance except out of the statute, as if he were absolutely seised in fee: and this is by construction of law; and so it is expressly declared by Lord HALE in 1 Mod. 110, and so is Poph. 6, which shews that common recoveries are considered as conveyances by tenant in tail; for if they were considered as real recoveries, and not as conveyances, all charges

Generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate-tail *and a reversion in fee, which may exist together: in such a case, by the operation of the statute *De donis*, the estate-tail is kept alive, not merged by the reversion in fee. Whether the recovery extend the estate-tail, or as more accurately stated by TRACY, J. in *Lord Derwentwater's* case, it be a conveyance excepted out of the statute *De donis*, it is immaterial to consider: though I observe that in *Martin v. Strachan*, Lord Ch. J. LEE adopted the latter expression; and by the recovery the tenant in tail may dispose of the fee.

The facts of this case are shortly these: J. Younger, being seised in fee, devised certain parts of his estates to S. Atkinson in fee, and other parts to S. Atkinson for life, with the remainder to E. Waterfield in tail. These two estates afterwards came to C. Bowker in tail; one of which she took by purchase under the

and incumbrances made by tenant in tail would be gone; whereas, without question, the land is subject to the leases, recognizances and charges of the tenant in tail in possession who suffers a recovery: but it is not subject to the charges of him in remainder or reversion; which shews that nothing passes from the remainder or reversion by such recovery.† It appears then that an absolute, unfettered, pure fee-simple passes by the common recovery, which is made so by the removal of all limitations on it, and then there can no other fee pass; for there can be but one fee that passes; there cannot be an absolute and qualified fee in one and the same person. Therefore it is this use of the fee-simple that passes to the recoveror from the tenant in tail, and which results to him and his heirs if no use is declared. It is the estate-tail, that old estate-tail considered as a fee, that

Jacob Banks had as a purchaser, which must descend to his heir at law; and not the reversion in fee *ex parte maternâ*, for that reversion is entirely gone and extinct. Therefore we think that the plaintiff's title is not good.

"And as we are of opinion that the lessor of the plaintiff who only claims as heir to Jacob Banks *ex parte maternâ*, and who must recover upon the strength of his own title, and not on the weakness of the defendant's, cannot entitle himself as heir *ex parte maternâ*, the other question concerning the disability of the defendant is out of the case and immaterial; because the defendant's possession is a title as against the plaintiff. We are therefore of opinion (and I have authority from my brother CHAPPLE, who is out of order, to say he is also of opinion) that judgment must be given for the defendant."‡

1793.
ROG
v.
BALDWERE.
[*111]

† Poph. 7, and 1 Co. 61, *Capell's* case.

‡ This judgment was confirmed in

Dom. Proc., where Lord Ch. J. WILLES "delivered the opinion of the Judges in 1743. Will. Rep. 444."

1793.

ROE

v.

BALDWERE.

limitation to the daughters of E. Crow; the other by descent under the estate-tail originally limited to E. Waterfield; she, being so seised in tail of the different parts of these estates in different rights, suffered (together with her husband) a common recovery of the whole, and the question arises on the effect of that recovery as to the respective parts of the estate. It seems to have been admitted that the case of *Martin v. Strachan* decides this case as far as it goes; and indeed it ought to put the question into a state of repose, because that case was very ably discussed here, and the judgment of this Court was afterwards confirmed in the House of Lords. According to that case, it stands thus: the common recovery puts an end to the estate-tail; the estate immediately afterwards becomes an estate in fee; and the party, whose estate is converted into a fee, if he took the estate-tail as a purchaser, must take the fee as a purchaser; or if he took the estate-tail by descent, must take the fee also by descent as from the same ancestor.

A distinction, however, has been taken by the plaintiff's counsel, between the operation of a common recovery respecting copyholds and freeholds. But it would lead to perplexity if different rules were applied to different sorts of estates. Copyhold estates are neither within the statute *De donis*, or that of Uses; neither indeed are they the subject of entails, unless there be a custom in the manor to warrant it (which was admitted in this case). It was in conformity to the rule respecting real estates, and to prevent any estate being unalienable, that the same rule was adopted in the case of copyholds as a mean of unfettering estates and to prevent perpetuities. And I know of no *authority which makes any distinction in this respect between copyholds and freeholds. In all other points, where the lord of the manor is not prejudiced, the same rules of descent apply equally to both. But this case has been ingeniously argued on the forms of a recovery, and it has been compared, as to the copyholds, to the case of a feoffment and re-feoffment. But this is by no means like the case of a feoffment and re-feoffment; and we cannot enter into these forms; they are, perhaps, inexplicable; but they must be taken as a mere mode of conveyance by a tenant in tail, and ought so to be considered in

all respects: it was so considered by the Court in *Martin v. Strachan*. Without, however, wasting time in going through the doctrine laid down by Lord Ch. J. LEE in that case, I think we are bound to adopt the authority of it here, and to apply it to both these species of property. Therefore that part of the estate which the person, who suffered the common recovery, took by purchase, must go to the heir *ex parte paternâ*; and that which she took by descent from the maternal ancestor to the heirs *ex parte maternâ*.

1793.
ROE
c.
BALDWERE.

Per CURIAM :

Postea to the plaintiff.

WILKINS AND OTHERS v. DESPARD.

(5 T. R. 112—118.)

1793.
[112]

If a ship be seized as forfeited under the Navigation Act, 12 Car. II. c. 18, by a governor of a foreign country belonging to Great Britain, the owner cannot maintain trespass against the party seizing, although the latter do not proceed to condemnation; for by the forfeiture the property is devested out of the owner.

IN trespass for taking the plaintiff's sloop, or vessel, with a cargo of logwood and mahogany, the defendant pleaded that the cargo, &c. a little before the said time when, &c. had been exported out of certain territories then and still belonging unto, or being in the possession of, our sovereign, &c. in America, in the said sloop, &c. which was carrying them on the high seas; such sloop or vessel not being a sloop or vessel which did truly and without fraud belong only to the people of England, or Ireland, &c. (negating the words in the stat. 12 Car. II. c. 18, s. 1), contrary to the form of the statute, &c.; whereby and by force of the said statute the said cargo so exported out of the aforesaid places in the sloop or vessel as aforesaid, and the said sloop or vessel with all its guns, &c. became forfeited, and the defendant at the time when, &c. did seize, take, and carry away the said cargo, and the said sloop or vessel then carrying the same, with all its guns, &c. as forfeited to and for the use of his said majesty, and of himself the defendant, as it was lawful, &c.

1793.
 WILKINS
 v.
 DESPARD.

There was a second special plea similar to the first, with this difference only, that it stated that the defendant seized the vessel in the Bay of Honduras as governor, &c. as forfeited to the use of the king and of himself.

Replication, protesting that the said cargo had not been exported out of any lands, &c. belonging unto or being in the possession of our sovereign, &c. in America, in the said sloop, &c. that the defendant after the said seizing, taking, and carrying away, the said cargo, and the said sloop or vessel then carrying the same, with all its guns, &c. as forfeited to and for the use of his said majesty and of himself, (the defendant) to wit, on the 1st of Sept. 1789, at, &c. without any sentence of condemnation of the said cargo and the said sloop or vessel then carrying the same, or of any part thereof, being given or rendered by any court having competent jurisdiction in that behalf, sold and disposed of the said sloop or vessel, and stores and provisions with the cargo mentioned, in the said sloop or vessel, and converted and disposed thereof to his own use, &c. The like to the other plea. To these the defendant demurred.

[113] *Wood* in support of the demurrer :

* * * The forfeiture here was complete by the seizure, and the property immediately vested in the crown and the defendant, without any sentence of condemnation. A forfeiture by statute is analogous to a forfeiture at common law. And by an outlawry the property is transferred from the outlaw to the crown : it immediately vests in the crown, without office found, or any further act done. Co. Lit. *128, b; Bro. Abr. "Utlagarie," pl. 26. That a sentence of condemnation either in the Admiralty Court or the Exchequer is not necessary in all cases is evident from the first section of this statute, which enacts that one third of the forfeiture shall go "to him who shall seize, inform, or sue for the same, in any court of record."

[He cited *Robert v. Witherhead*, 12 Mod. 92; Salk. 223.]

Gibbs, contra : * * *

Wood, in reply : * * *

LORD KENYON, Ch. J.:

I cannot distinguish this case in principle from that cited from Salk. and Mod. The action of *detinue* proceeds on the ground of property: it was there determined that *detinue* would lie, although there had been no sentence of condemnation; and from that it follows, as a necessary consequence, that the property is vested in the defendant, or is at least divested out of the plaintiffs.

1793.

WILKINS
v.
DESPARD.

BULLER, J.:

There are two *nisi prius* cases, in which the opinions of GOULD, J. and of Lord MANSFIELD are in favour of the defendant. (Mr. J. BULLER then read the following notes.)

"*Thomas* and another v. *Withers* and others, Guildhall Sittings by adjournment before Mich. 16 Geo. III. C. B. In an action for goods sold and delivered the defence was, that the goods had been smuggled by the plaintiffs; to prove which a copy of the record of condemnation was produced, in which there was no claim; nor did it appear that the plaintiffs had any notice of the proceedings. But GOULD, J. held it conclusive evidence against all the world; and on proving the identity of the goods the defendant had a verdict. GOULD, J. also said, that a seizure without condemnation, provided it were not proved to be an illegal one, would be a good defence. And he read the following note of a case determined by Lord MANSFIELD."

"*Hennel v. Perry*, Westminster Sittings after Mich. 1 Geo. III. Plaintiff sold china to the defendant to be rung off on a future day, the defendant being only to take what was sound. This china was afterwards seized by the custom-house officer, and the defendant offered to pay half the amount, but the plaintiff *insisted on having the whole. No evidence was given that the plaintiff had bought these goods; but it was proved that he had bought some of the same nature, and no condemnation was given in evidence. Lord MANSFIELD held that this seizure must be taken to be on lawful grounds, and then the plaintiff had no title to the goods; the defendant could have no benefit from them, and then there was no consideration for the promise. That the East India Company had a monopoly of India goods; and to entitle a man to property in such he must trace them to the India

[*118]

1798.
WILKINS
v.
DESPARD.

sales. And suppose both parties were culpable, the plaintiff would not have a right to recover. The plaintiff was accordingly non-suited, which was submitted to."

Then it is necessary to see what are the facts here, as admitted on the record. To an action of trespass for taking the plaintiff's ship and goods, the defendants have pleaded that the ship, &c., was seized as forfeited: this is not denied by the replication, but is admitted; the plaintiffs might have put that matter in issue, and then the facts might have been inquired into. The plaintiffs, however, contend that the legality of seizure may come in question on this record: but when it is admitted by the pleadings, as a fact, that the ship was seized as forfeited under the Navigation Act, the Court cannot say as a point of law that she was not seized for that purpose, and that the defendant is a trespasser, merely because it appears that the defendant did not proceed to condemnation. I cannot distinguish this case from that cited from Salk. and 12 Modern.

GROSE, J. of the same opinion.

*Judgment for the defendant.**

The Court, however, gave the plaintiffs leave to amend the pleadings, if they thought they could vary the facts.

1793.
Jan. 25.
[118]

DAVIS v. MASON.

(5 T. R. 118—120.)

In consideration that A. would take B. as an assistant in his business as a surgeon, for so long a time as it should please A., B. agreed not to practise on his own account for fourteen years within ten miles of the place where A. lived, and gave a bond for this purpose: this bond was held good in law.†

DEBT on bond for 200*l.*; the condition of which (after reciting that the plaintiff had taken the defendant as an assistant in the business of a surgeon, apothecary, and man-midwife, and that the defendant had agreed with the plaintiff not to exercise the business on his own account

* The above case is followed (1877) in *The Annandale*, a case of forfeiture under s. 103 of the Merchant Shipping Act, 1854, reported (1877)

2 P. D. 179, 183.—R. C.

† Cited by M. R. in *Gravelly v. Barnard* (1874) L. R. 18 Eq. 518, 522.

within the distance of ten miles from Thetford, where the plaintiff resided *for fourteen years,) was that the defendant would not exercise the business, &c. within that distance, &c. The defendant pleaded that before the execution of the bond it was agreed between the plaintiff and the defendant that the latter should become an assistant to the former, in the above business, "for so long a time as it should please the plaintiff," and that the defendant should not exercise that business on his own account within the distance, &c.; that the defendant in pursuance of such agreement should execute the bond; that the defendant accordingly entered into the plaintiff's service on the 18th of July, 1789; that on the 15th of August, 1791, the plaintiff "without the consent of or any misconduct or default in or by the defendant and against his will dismissed the defendant from his service as an assistant," &c.; and that the defendant lawfully served an apprenticeship in this business, wherefore he exercised it on his own account within ten miles, &c.; concluding that the agreement and bond were void in law. The plaintiff replied that the defendant was guilty of misconduct when in the plaintiff's service, for which he was dismissed, &c.

[To this there was a special demurrer, on the ground that the matter proposed to be put in issue was immaterial.]

The Court said that the pleadings were entirely beside the question, and desired the counsel to confine themselves to arguments on the validity of the bond.

Lawes in support of the demurrer admitted, on the authority of *Mitchell v. Reynolds*,† that bonds which restrain a person from exercising a particular trade in a particular place are not necessarily void, but contended from the same authority that such a bond ought to be founded on a reasonable and an adequate consideration; which did not appear in the present case. The bond in question was unreasonable both in the duration and limits of the prohibition. * * * There is another argument against this bond which may fairly arise from the nature of the defendant's employment, in which the public health is materially interested. * * *

1793.
DAVIS
c.
MASON.
[*119]

[120]

† 1 P. Wms. 181.

1793.
DAVIS
v.
MASON.

LORD KENYON, Ch. J. (stopping *Dampier*, who was to have argued on the other side) :

This question has been at rest ever since the case of *Mitchell v. Reynolds*. A bond in restraint of trade cannot be arbitrarily taken, and without consideration ; some consideration must appear. But here, the plaintiff being established in business as a surgeon at Thetford, the defendant wished to act as his assistant with a view of deriving a degree of credit from that situation ; on which the former stipulated that the defendant should not come to live there under his auspices and steal away his patients : this seems to be a fair consideration for the bond. Then it was objected that the limits within which the defendant engaged not to practise are unreasonable : but I do not see that they are necessarily unreasonable, nor do I know how to draw the line. Neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practise as a surgeon in this town.

Judgment for the plaintiff.

K. B. EASTER TERM.

1793.
April 23.
[177]

GOODRIGHT, ON THE DEMISE OF BURTON, *v.* RIGBY.
IN ERROR.

(5 T. R. 177—181.)

Though the deeds to make a tenant to the *præcipe* be not executed till after the execution of the writ of *seisin*, still recovery will be good by the 14 Geo. II. c. 20, if the deeds be executed in the term in which the recovery is suffered.

In this ejectment the lessor of the plaintiff claimed as next in remainder after a tenant in tail (Sarah Williams) who had suffered a recovery in her lifetime ; and the only question now * made was on the validity of that recovery ; as to which the facts

* In the Court of Common Pleas another question was discussed, Whether or not S. Williams were tenant in tail ? but that point was abandoned here ; and the counsel for

the plaintiff in error admitted her to have had such an estate. See the report of this case in the Common Pleas in 2 H. Bl. Rep. 47, where the verdict is also set forth.

in the special verdict were shortly these; that on the 19th and 20th of November, 1778, the deeds, making the tenant to the *præcipe*, were dated; that the recovery was suffered in Michaelmas term in the same year; and that the writ of seisin was awarded, tested the 6th of November, to which the sheriff returned that he had delivered seisin on the 10th of November, 1778. The Court of Common Pleas, where this action was brought, gave judgment for the defendant, to reverse which a writ of error was brought.†

1793.
GOODRIGHT
v.
RIGBY.
In Error.

Gibbs, for the plaintiff in error, objected to the validity of the recovery, because the writ of seisin was executed before the deeds making the tenant to the *præcipe*, as it appeared on the sheriff's return to that writ. * * *

LORD KENYON, Ch. J.:

No sooner had the statute *De donis* passed, at the instance of the great men in the kingdom, which was framed in order to render their estates unalienable, than the spirit of the country wished to apply a remedy to that which tended to despotism, and the good sense of the judges at that time coinciding with the wishes of the people, the great operation of the statute *De donis* was destroyed by the revival of common recoveries. This was found so beneficial that it has been the endeavour of all succeeding ages to facilitate that mode of conveyance; care, however, being taken that the forms prescribed are complied with. *Lord Derby's* case, which has been cited,‡ has always been considered as a strange case; and the judges of succeeding times have been astonished that no application was made to the Court of Common Pleas to rectify the defect in that recovery, according to the usual practice of that court. There the objection was, that there was no writ of seisin, which (it is *well known) is never in fact executed. But to remedy some inconveniences attending the omissions of forms in suffering common recoveries, the statute 14 Geo. II. c. 20, was passed. And, after reading the clauses of

[179]

[*180]

† Although the procedure in recoveries was superseded by the simpler modes of assurance provided by the Act 3 & 4 Vict. c. 74, the judgments in this case are retained

for their important bearing upon the principles and spirit of the common law relating to entails.—R. C.

‡ *E. of Derby v. Witham*, 2 Str. 1185, and 1 Wils. 48.

1793.
GOODRIGHT
v.
RIGBY.
In Error.

that Act, it seems extremely difficult even to conceive a doubt; for it enacts that "every recovery already suffered, or hereafter to be suffered, (operating with a retrospect as well as prospectively,) shall be deemed good and valid to all intents and purposes, notwithstanding the fine, or deed, making the tenant to such writ, shall be levied or executed after the time of the judgment given in such recovery, and the award of the writ of seisin as aforesaid, provided the same appear to be levied or executed before the end of the term in which such recovery was suffered." The sense of that clause is, that the recovery shall be valid, provided the deed making the tenant to the *præcipe* be executed before the end of the term in which the recovery is suffered; and it appears on this verdict that the deeds making the tenant to the *præcipe* were executed within that term. And though the statute, in enumerating some of the defects for which a remedy was to be applied, does not mention this particular defect, it has always been understood that the Act was intended to remedy every defect of this kind, provided that, which is there made a condition, be complied with, namely, the making of the tenant to the *præcipe* before the end of the term in which the recovery is suffered; and I think we should not satisfy the words of the statute by any other construction.

ASHHURST, J. :

The public policy of this kingdom having required that it should not be in the power of any individual to make his estate unalienable, common recoveries were encouraged as a mode of guarding against the evil; and in order to facilitate the destruction of estates tail by that mode of conveyance, the statute of the 14 Geo. II. c. 20, was passed. That act must be considered as a remedial law, and therefore it ought to receive the most liberal construction. The words at the end of the clause, "provided the deed be executed before the end of the term, in which such recovery is suffered," shew that the Legislature meant that no advantage should be taken of the execution of the deed to make the tenant to the *præcipe* being subsequent to any part of the proceedings, provided it were executed before the end of the same term. It has been contended, however, that those words are not

to be taken in their general sense, but must be restrained so as to operate only on those two cases, the inconveniences of which are recited in the former section, and that, because *the statute only mentions two particular cases, the remedy shall not be extended to others not particularly enumerated : but, as this is a remedial law, the general words, giving the remedy, must not be restrained by the words of the preamble, but ought to be extended to all cases where the inconvenience is the same.

1793.
GOODRIGHT
v.
RIGBY.
In Error.
[*181]

BULLER, J. :

It is admitted that all the parts of the recovery are mere matters of form : but it is said that the date of the 10th of November is conclusive on the Court, and that we must understand that the writ of seisin was actually executed on that day, when we all know that it is never executed at all. The question arises on the statute 14 Geo. II. c. 20 ; the words of the enacting clause of which, it is contended, must be confined by those in the preamble. But the preamble only states the cases that had before existed in point of fact, and in which the intention of the parties to suffer the recoveries had been defeated, namely, where the deed making the tenant to the *præcipe* had been executed after the judgment, and after the award of the writ of seisin, and the Legislature said that neither of those defects should be any objection to the validity of any recovery ; and instead of saying that they only granted relief in those cases, they said they relieved in all cases, provided that the deeds were executed in the term in which the recovery was suffered ; because they considered recoveries to be mere matters of form, (as indeed they have always been considered,) and because all the different parts of the recovery are to be taken as one entire transaction.

GROSE, J. :

I consider this as a remedial law ; and therefore I think that the Courts ought to lend their assistance in giving full effect to it. The Legislature meant to relieve in all cases where the acts to be done were completed within the same term. I am of opinion that this case comes within the Act of Parliament ; and that the judgment of the Court of Common Pleas ought to be affirmed.

1793.
May 3.

[211]

SALTE AND ANOTHER *v.* FIELD.

(5 T. R. 211—215.)

Goods are sold and delivered by the vendor to an agent, acting under a general authority, on account of a vendee who is abroad. Previously to the sale, the principal had written to the agent stating that he is ruined, and directing the agent to return any goods purchased on his account. This letter, which arrives after the delivery of the goods, is communicated by the agent to the vendor, who agrees to take back the goods. Held, that the property in the goods, as between the vendor and creditors of the vendee who have attached the goods in the hands of a bailee to whom they have been delivered by the agent, is in the vendor.

In trover for 176 pieces of printed calico, the question was, Whether the goods were the property of the plaintiffs, or formed a part of the effects of Dewhurst a bankrupt, and as such vested in his assignees? and on the trial of a special case was reserved, in substance, as follows :

Dewhurst had a house of trade in Austin Friars, London, where his business was conducted by J. Hill his clerk, and had also a house of trade at New York, where he himself resided and conducted his business. The goods in question were sold by the plaintiffs to Dewhurst through the intervention of Hill his clerk, on the 3rd and 5th of May, 1792, and were delivered on those days at the house in Austin Friars, London, and were afterwards sent by Dewhurst's clerk to the defendant to be packed, in order to their being shipped to Dewhurst at New York. On the 9th of April, 1792, Dewhurst wrote a letter to Hill, his clerk and and manager in London, which was received by the latter in London on the 18th of May, 1792; in that letter, after saying that he was ruined in consequence of several failures, he added, "if you have purchased any goods for my account, or if any orders are given out, let the persons have their goods back, and countermand all orders." This letter was shewn by Hill to the plaintiffs on the 18th of May, 1792, about nine o'clock in the evening, who then informed Hill they were ready to take back the goods as proposed by the letter. On the 18th and 19th May, 1792, several attachments were made in the mayor's court and sheriff's court, London; and served upon the defendant by creditors of Dewhurst, in order to attach the goods in question, and other goods which had been sold to Dewhurst and sent to

the defendant as his packer; and the debts for which such attachments were made exceeded in amount the value of all the goods in the hands of the defendant. On the 21st of May, 1792, a meeting of Dewhurst's creditors was convened by Hill his clerk, when the letter was laid before them. On the 23rd May, 1792, the plaintiffs demanded the goods in question of the defendant, and in consequence of their not being delivered commenced the present action. Dewhurst returned to England in October, 1792, and S. Wilson and Barnard were the *assignees of his estate and effects under a commission of bankrupt dated 19th January, 1793.

1793.
SALTM
v.
FIELD.

[*212]

Baldwin for the plaintiffs contended, first, that the property of the goods never vested in Dewhurst; because on the 9th April preceding the delivery of the goods to Hill the agent, his agency was determined, at least with respect to any advantage to be derived from it to the bankrupt; and consequently after that time the latter could not avail himself of any act done by Hill in his favour. 2ndly, But supposing the property of the goods did vest in Dewhurst in the interim between the delivery and the assent of the vendors to the countermand, yet when that assent to receive back the goods was given, it had relation back to the bankrupt's offer, which was on the 9th April, and consequently it is not affected by the subsequent attachments or bankruptcy. For the assignees, or those who claim from the bankrupt, can only take his property, subject to those equities which would have affected himself in case he had remained solvent: and if the offer made by him to return the goods, when he found he was no longer likely to pay for them, being founded in honour and conscience, was binding upon him, and was such as he then could legally make, he having then the disposal of his own effects, his act will equally bind his assignees, who are the real defendants in this case. This point, however, does not rest on general argument, but was solemnly decided in *Atkin v. Barwick*.† The difference, if any, is in favour of the plaintiffs demand: the facts of it are in substance the same; but there, although the goods were sent to a third person before the bank-

† 1 Str. 165.

1793.
SALTE
v.
FIELD.

ruptcy, yet no notice was sent of, there having been such a delivery to the use of the vendors till after the bankruptcy; whereas here the countermand and relinquishment of the property was sent before the attachments or the bankruptcy, namely, on the 9th April, 1792, to which the assent of the plaintiffs must have relation.

[*213]

Park, contra, said there was a material distinction between this and the case of *Atkin v. Barwick*; for there the goods were actually sent by the bankrupt to a third person, and accepted by him to the use of the vendor before the bankruptcy, although the notice was not sent to the vendor himself till afterwards; so that there was a complete delivery to him, and not merely an offer to deliver, while the bankrupt *had still the disposition of his property. But there is another and a more important distinction between the two cases, as the case of *Atkin v. Barwick* was understood by Lord MANSFIELD in *Harman v. Fisher*,† where he observed that the judgment of that case seemed to be right, but that the reasons, as reported by Strange, were wrong: That the true ground was, that the trader very honestly refused to accept the goods, and returned them. And his Lordship again adverted to the same case, with the same doubts as to the reasons for the judgment, in another case of *Alderson v. Temple*.‡ And it is to be observed that the goods in that case in Strange were never entered in the bankrupt's stock, but were soon after the delivery sent by them to another person for the vendor's use. Here the goods were accepted into the bankrupt's stock by his agent, and acts of ownership exercised upon them, they being sent to the packers for the purpose of being prepared for exportation. This therefore forms a material distinction between the two cases. It cannot be contended that the property did not once vest in the bankrupt: for when an agent is invested with a competent authority to act for his principal, nothing can be better established than that all the acts of such an agent, more particularly with respect to third persons, must be binding upon the employer until the agency is revoked by notice delivered to the agent. If it were otherwise, no person would be safe in treating with agents

† Cowp. 125.

‡ 4 Burr. 2239.

of persons abroad. The plaintiffs might undoubtedly have insisted upon the sale after the agreement and delivery to Hill : that delivery therefore was absolute and unconditional as to the two contracting parties in London, and could not be undone without the mutual assent of both. The property was as completely vested in the bankrupt by the act of his agent, as if he had been present himself. Then notwithstanding the offer of one of the parties to relinquish the contract, it could not be revoked until the assent of the other was actually given. Now that assent was not given till the goods had been attached by other creditors of the bankrupt ; and if at the time of the attachment the property of the goods remained in Dewhurst, it was not in the power either of him or the plaintiffs by any subsequent act to defeat the attachment.

1793.
SALTE
v.
FIELD.

The Court stopped *Baldwin* from replying.

LORD KENYON, Ch. J. :

The property in these goods was apparently divested out of the plaintiffs at the time of the sale, *according to the opinion which the parties then had of the transaction : but afterwards when all the facts were disclosed, and when Dewhurst was desirous not to purchase any other goods, it was in the power of the buyer and seller to put an end to the contract as if it had never existed ; and it is stated that the proposition made by the purchaser to rescind the contract was acceded to by the sellers. I cannot distinguish this case from that of *Atkin v. Barwick* on principle ; for in that case there had been a delivery of the goods by the seller with the concurrence of all the parties interested ; but the agreement of the parties to rescind that contract put an end to the sale as if it had never taken place. So, in this case, it was competent to the principal to disavow the contract made by his agent, if the vendors chose to accede to it : the proposition made by the purchaser, and which was dictated by common honesty, might have been refused by the vendors if they had chosen : but they agreed to it, and by the mutual agreement of both, the contract of sale was rescinded. If Dewhurst had died before the purchase, the contract must have been put an end to.

[*214]

1793.

ASHHURST, J. :

SALTE
v.
FIELD.

The case cited from *Strange* directly applies to the present. By the letter written by Dewhurst, and by the subsequent act of all the parties, the sale was rescinded. A proposal to that effect was made by one party, and agreed to by the other ; and, by that, the contract was put an end to by the consent of both. And though the goods remained in the hands of the defendants, they did not remain there for the purpose for which they were originally intended : but, the contract being rescinded, the property reverted in the plaintiffs ; and therefore the creditors of Dewhurst had no right to attach the goods in the hands of the defendant, because at that time they were no longer the property of Dewhurst.

BULLER, J. :

The principle on which the case of *Atkin v. Barwick* was decided governs this : and indeed that is a much more favourable case for the plaintiffs than this. The point there contended for was, that there was no consent by the sellers to rescind the contract ; but here an express consent by them is stated. As to the assent there, the Court said they would presume it, because it was for the interest of the parties : but here it is not necessary to presume such a consent, it being expressly proved. With regard to the justice of the case, it is impossible to entertain any doubt. A question has been put in argument, whether those acts done by *the agent before he knows of the revocation of his letter of attorney, are good ? I think that the principal in such a case could not avoid the acts of his agent, done *bonâ fide*, if they were to his disadvantage : but he might consent to avoid those which were for his benefit. And here the principal was anxious to rescind this as well as all other contracts made by his agent ; and the vendor agreed to take the goods back again.

[*215]

GROSE, J. of the same opinion.

Postea to the plaintiffs.

TOOKE *v.* HOLLINGWORTH AND OTHERS, ASSIGNEES
OF DANIEL.

(5 T. R. 215—234.)

1793.
May 3.

[215]

HOLLINGWORTH AND OTHERS *v.* TOOKE.

IN ERROR.

(2 H. Bl. 501—504.)

A. and B. came to this agreement, that B. should purchase of A. all the light gold coin which he could send at a stated price, and that A. should from time to time draw upon B. for the money due upon such sale; and that B. should also from time to time accept other bills drawn by A. for his own convenience, for which A. was to remit value: after they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A. (not knowing of the bankruptcy), sent a parcel of light gold and bills, to enable B. to discharge the acceptances, which parcel was taken by B.'s assignees. A. afterwards discharges the acceptances. Under these circumstances B. is to be considered as the *factor* or *banker* of A., and as having only a *qualified property* in the goods and bills which were so sent for a particular purpose, the general property being in A. Therefore that purpose not being answered, A. may recover back from the assignees of B. the amount of those goods and bills.*

THIS was a special verdict, in an action of trover for three bills of exchange, and a certain quantity of guineas.

Two years before the bankruptcy of Daniel it was agreed between the plaintiff, and a merchant residing at Manchester, and Daniel then of London, goldsmith, that the latter should purchase of the former all the light gold coin of this realm, which the plaintiff should send from Manchester to Daniel in London, at a certain stated price to be paid by Daniel, to wit, at the rate of 20*s.* 11*d.* for each guinea, and that the plaintiff should from time to time draw bills of exchange upon Daniel, for the money due to the plaintiff upon such sale of the light gold, which bills should be made payable at the end of two months from the respective dates thereof; and that Daniel would also from time to time accept other bills of exchange, drawn by the plaintiff for his own convenience; but in such case the plaintiff

* Compare *Bent v. Puller*, p. 654, 13 Q. B. D. 740; *Ex parte Banner, In re post; In re Broad, Ex parte Neck* (1884) 2 Ch. D. 278, 289.

1793.
TOOKER
v.
HOLLING-
WORTH.

[*216]

should remit value to Daniel to the amount of such acceptances, to answer together with the light gold for the different bills so drawn on Daniel; by reason of which agreement an account subsisted between them, upon which, at the time of the bankruptcy of Daniel hereinafter mentioned, Daniel was under acceptances for the plaintiff, in the course of their dealings under the contract, to the amount of 873*l.* 7*s.* 6*d.* which sum exceeded the *value of all the gold and bills remitted by the plaintiff to Daniel, including the gold and bills in the declaration mentioned. Independently and exclusively of the said acceptances upon the balance of the said account, Daniel, at the time of his bankruptcy, was indebted to the plaintiff in 531*l.* 7*s.* 7*d.*: and none of the bills so accepted by Daniel, for the plaintiff, at the time of the sending of the money and three bills of exchange hereafter mentioned, were due or payable. The plaintiff being possessed of the three bills of exchange in the declaration mentioned (the same being then unpaid, and of the value, &c. therein mentioned) and also of the 213 light guineas, and 19 light half guineas, as of his own bills of exchange and monies, in pursuance of the said agreement so made with Daniel, and in order to enable him to pay the said bills so accepted by him for the plaintiff, when they should become due, (and being then wholly ignorant of Daniel's being a bankrupt as hereafter is mentioned,) late in the evening of the 19th of July, 1791, sent by the mail-coach at Manchester, which goes from thence to London, the said bills and monies in the declaration mentioned, in a box directed for Daniel, and paid the carriage thereof; which bills set out from Manchester for London early in the morning of the 20th of July, and the monies were then and there partly cut and partly uncut: and the plaintiff on the same day, by the same mail, also sent a letter addressed to Daniel, in which he advised Daniel that he had sent to him the money and bills mentioned in the declaration, and transmitted to him an account of some light gold and bills which he had sent on a former day, and also an account of the bills drawn by the plaintiff on Daniel (in number six) since his last letter, a few days before. None of the drafts so advised to be drawn upon Daniel by this letter were ever accepted by him. The letter and box containing the three bills of exchange and monies, after-

wards, on the 21st of July, were delivered to one Joseph Heathcote (the messenger under the commission) at Daniel's house in London, the messenger having been in possession from the 19th of July of the house and of the goods and effects of Daniel; and the messenger paid the portorage for the same. The verdict then stated that Daniel had committed an act of bankruptcy on the 6th of July, 1791, by absconding; that the commission issued on the 19th of July, on which day at three o'clock in the afternoon Daniel was declared a bankrupt; that on the 30th of July the assignment was made to the defendants; after which the *messenger delivered the bills and guineas to the defendants, who at the time within mentioned, as such assignees, &c. refused to deliver the same upon demand to the plaintiff, and converted, &c. That after the commission issued, and before any of the bills drawn by the plaintiff and accepted by Daniel were paid by Daniel or by the defendants, or presented to them for payment, and before the conversion above stated, the plaintiff paid the amount of them to the several holders; and that Daniel's estate was thereby wholly exonerated therefrom. And that the plaintiff was wholly ignorant of Daniel's bankruptcy until after the delivery of the bills and money to the defendants. But whether, &c.

1793.
TOOK
v.
HOLLING-
WORTH.

[*217]

[The case was elaborately argued at the bar; and the Court (Lord KENYON, Ch. J., ASHHURST, J., BULLER, J. and GROSE, J.) concurred in giving judgment for the plaintiff. The judgment of GROSE, J. is here given as having taken the point upon which the decision was ultimately rested, and this judgment confirmed in the Exchequer Chamber.]

GROSE, J. :

[232]

This is one of those unfavourable cases under the bankrupt laws, where an endeavour is made to take the property of one man to pay the debts of another. There can be *no doubt therefore about the justice of the case; for the plaintiff has paid the acceptances of the bankrupt, and the goods were only sent to the bankrupt for the express purpose of paying those acceptances. The form of this action is trover; and the question is, Whether

[*233]

1793.
TOOKE
v.
HOLLING-
WORTH.

the property of these goods be in the plaintiff or the defendants? There was a time when the exclusive property was clearly in the plaintiff: then it may be asked, Has it ever been in the defendants? or, if it have, has it ever reverted in the plaintiff? The defendants claim a right to retain these goods under an agreement; and in the argument they considered this as a case of goods sold and delivered under that agreement: if it really were a sale of the goods under the former part of the agreement I should have considerable doubts about the case. But the words of the agreement are material to be considered; for I think that it consists of two parts, and that the transaction on which this question arises grows out of one part of it only. The first part of the agreement was, that the bankrupt should purchase of the plaintiff all the light gold that the latter should send, and that the plaintiff should draw bills upon the bankrupt for the money due upon such sale, payable at the end of two months; the other part of the agreement was, that Daniel should from time to time accept other bills drawn by the plaintiff for his own convenience, and that the plaintiff should in such case remit value to Daniel to the amount of such acceptances, to answer together with the light gold for the different bills so drawn on Daniel. Then let us see whether what passed between these parties under the first part of the agreement can be considered as a case of goods sold and delivered: if the gold is to be considered as goods sold to the defendant, then bills were to be drawn by the plaintiff on the bankrupt at two months: but in the verdict not a word is said about the bills being drawn for the light gold mentioned in the verdict. The state of the transaction at the time of the bankruptcy was this: there were acceptances by the bankrupt to the amount of 879*l.* over and above the gold and bills in question. Now, the bankrupt being under such acceptances, what was the probability of the transaction? Not that the plaintiff would sell the gold, but that he would remit goods to discharge the acceptances. However, we are not left to determine on conjecture or probabilities on a special verdict; for it is expressly found as a fact that the plaintiff, in order to enable the bankrupt to pay the acceptances when they should become due, sent the goods in question; and it is also found by the verdict that those bills were

*afterwards paid by the plaintiff. Then the purpose, for which the property in question was sent, was answered by the plaintiff himself; and that lets in the doctrine of Lord Hardwicke in the case *Ex parte Dumas*,† which I consider immediately and directly in point. The instant the acceptances were taken up by the plaintiff, and the end for which the goods were sent was answered, I consider the property as revested in the plaintiff. But it has been asked, When and how was this property revested in the plaintiff? I consider it to have been a qualified and conditional property in the defendants; it was not vested in them as an absolute and unconditional property by the transmission for a particular purpose: it was vested in them only for a special purpose, and the instant that purpose was answered in another way, the property was revested in the plaintiff. Then it was asked, What would have been the case had the acceptances been discharged by the bankrupt? I answer, that in such a case the purpose for which they were sent would have been answered by the bankrupt, and then the plaintiff would have had no property in the goods; then that property, which was before conditional, would have become absolute in the bankrupt. This case comes directly within that of *Dumas*; for here the goods were sent for a particular purpose; the property vested in the defendants for a particular purpose; and as soon as that purpose could not be answered by the bankrupt, or was otherwise answered by the plaintiff, the property revested in the plaintiff; and therefore I think he may maintain this action of trover to recover back this property, or the value of it.

1793.
TOOKE
v.
HOLLING-
WORTH.
[*234]

A writ of error having been brought on the judgment in this case it was twice argued in the Exchequer Chamber. And now the judgment of this Court was pronounced by

1795.
May 16.
[2 H. BL 501]

LORD CHIEF JUSTICE EYRE, who, after stating the special verdict, proceeded thus:

The case was well and laboriously argued at the bar. It was

† 2 Ves. 582; and 1 Atk. 232.

1795.

HOLLING-
WORTH
v.
TOOKE.
In Error.

very full of thorny points, which necessarily required from us a good deal of investigation. The consequence has been that a length of time, perhaps somewhat inconvenient to the parties, has elapsed before we could come to an agreement. We have at length come to an agreement, and we are all of opinion that this judgment ought to be affirmed. I shall state very shortly the reasons which have induced me to concur in that opinion. The right of the parties to the light gold and bills, which are the subject of this action, appears to me to depend principally upon the true construction of the original agreement between Tooke and Daniel, made two years and upwards before the bankruptcy.

[2 H. Bl. 502] That agreement consisted of two parts; one being a contract for a bargain and sale of light gold by Tooke to Daniel at a given price, to be paid for by bills of exchange payable at two months, a simple and unembarrassed transaction; the other being a contract, the effect of which was that Daniel should become Tooke's banker, that he should accept his bills, Tooke remitting value to the amount of such acceptances in bills and in light gold. That is plainly the effect of the latter part of the agreement. They might have dealt as mere merchants, the one selling and the other buying this article of light gold, and paying for it according to agreement. And had this been a case of that kind, the transaction would have had one complexion, and the argument upon it, I think, would have taken one course. But as they might act in that manner, so they might upon the latter branch of the agreement act as principal and factor, or principal and banker, and not as mere merchants; and the idea of bargain and sale would enter no farther into their transactions upon that branch of the agreement, than merely as it went to fix the price at which the light gold which should be remitted from time to time should be carried to the account of Tooke as cash, and be applied by Daniel, as Tooke's agent, in payment of the acceptances which he had made on the credit of Tooke. There would certainly be this mixture of bargain and sale in any transactions which should take place even under the latter branch of the agreement, which in other respects would be the transaction of principal and factor, or principal and banker. But though there be this mixture, yet I think the case of the

light gold cannot, in respect of that circumstance, be separated from the case of the bills. If Daniel was to be considered as factor or banker only with respect to the bills which should be remitted, he ought to be considered as banker or factor only as to the light gold, with an agreement on his part to apply that light gold in payment of his acceptances at the rate fixed in the former part of the agreement. In a word, the bargain and sale of the light gold, when considered under the second branch of the agreement as a remittance to pay the acceptances, is but an incident in the business of the principal character of factor or banker. Now, if it can be established that Tooke and Daniel acted in the characters of principal and factor, their respective rights of property are very easily ascertained: the general right of property would be in Tooke, the special right of property in Daniel, to enable him to execute the commission with which Tooke had entrusted him, and he would also have a lien as against the general property of his principal, for the balance of his account. In this way of considering the case, we may lay all this story of the bankruptcy entirely out of the question. For suppose Daniel had remained solvent, Tooke might at any time have paid him his balance, including any acceptances he might be under, and have withdrawn his effects out of Daniel's hands, and there could have been no room for a question between them, but merely as to the profit upon the light gold, estimated at the price in the agreement. Now I think that would depend upon the question whether the light gold was sold under the first part of the agreement, or whether it was to be considered as a mere article of remittance under the latter part; and according to my view of the case I think that question would be decided against Daniel. The assignees standing in the place of Daniel, certainly can be in no better condition than Daniel himself: they may be in a worse condition if many of the arguments which we heard at the bar, and of which we have an account in print, are well founded. But those arguments take a very wide compass indeed; they involve, as I have already said, points of considerable difficulty upon which we have not formed an opinion, and upon which perhaps an opinion ought not to be formed till the points come judicially and unavoidably before the

1795.
HOLLING-
WORTH
v.
TOOKE.
In Error.

[2 H. Bl. 503]

1795.

HOLLING-
WORTH
v.
TOOKE.
In Error.

[2H. BL. 504]

Court. If that discussion can be avoided now, I think we do our duty by delivering an opinion upon narrower grounds. The ground I have taken is very distinctly marked, and very well enforced in the argument of one of the judges of the Court of King's Bench.* He concludes somewhat differently from me, but the ground work is there. In my opinion it may be sustained, it steers clear of all difficulties, and it reaches the substantial justice of the case, because it meets the only argument of considerable weight that struck my mind, namely the possibility that the bankrupt might have been the creditor, and the injustice which would have been done to his estate if these effects could, on account of the bankruptcy, have been withdrawn from the mass of his estate. Now, as the principle upon which my opinion proceeds is, that the bankrupt would have a lien upon those effects for every thing for which his estate was creditor, that difficulty is removed. Upon this ground I concur in thinking that the judgment in this case ought to be affirmed, and it is the unanimous opinion of the Court that the

Judgment be affirmed.

GALE v. WALSH.

(5 T. R. 239—240.)

1793.

May 4.

[239]

In an action against the drawer of a foreign bill of exchange a protest for non-acceptance must be proved.†

In an action against the drawer of a foreign bill of exchange the question was, Whether it was necessary to prove a protest for non-acceptance; which was reserved by Lord Kenyon before whom it was tried at the Sittings after last Michaelmas Term, when a verdict was taken for the plaintiff.

Mingay for the defendant moved in last Hilary Term to enter a nonsuit; and the Court thought the matter so clear on the ground of the protest being part of the custom of merchants in the case of a foreign bill, that they suggested to the counsel

* This probably alludes to the opinion of Grose, J. (reported, *supra*). † Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, s. 51 (2).

for the plaintiff the expediency of making the rule absolute in the first instance to save unnecessary expense; and the rule was then made absolute. But on a subsequent day,

1793.
GALE
v.
WALSH.

Erskine, for the plaintiff, wished the rule to be opened again, intimating that it would appear upon the learned judge's report that the drawer had no effects in the hands of the drawee, in which case he contended that no protest was necessary; and that the want of notice to the drawer of the non-acceptance of an *inland bill of exchange had been held to be no objection under similar circumstances: the rule was accordingly suspended. But on this day,

[*240]

Lord KENYON, in reporting the case, said, that the fact relied upon by the plaintiff's counsel did not appear at the trial; and accordingly

The rule to enter the nonsuit was now made absolute.

GALLINI v. LABORIE.

(5 T. R. 242—244.)

1793.
May 4.

[242]

Having regard to the provisions of 10 Geo. II. c. 28, s. 2, and 25 Geo. II. c. 36, ss. 2, 3, no action can be maintained for the breach of an agreement "to dance at the King's Theatre in the Hay-Market, or at such other place as the plaintiff should appoint," if it appear that no licence for that theatre was granted by the Lord Chamberlain, as required by the 10 Geo. II. c. 28; and that the plaintiff did not request the defendant to dance at any other place which was licensed.

THE plaintiff brought this action upon a contract by which the defendant, a foreigner, undertook to come over to England in order to dance ballets at the Italian opera in the Hay-Market, called the King's Theatre, or at such other place as the plaintiff should appoint. The defendant never came at all. But it appeared that during the time for which the defendant had engaged there had been no licence from the Lord Chamberlain for the Opera House, though the plaintiff's company had exhibited dancing entertainments there: but the plaintiff had a licence for performing musical entertainments at an house in

1793.
GALLINI
v.
LABORIE.

Hanover Square. No request, however, was made to the defendant to perform there; nor did it appear that he had any notice that the plaintiff had such a licence. A verdict was given for the plaintiff at the Sittings after last term at Westminster before Lord Kenyon; which

Bower moved to set aside on the ground that inasmuch as the plaintiff had not obtained a licence from the Lord Chamberlain to perform entertainments of the stage, the defendant could not be bound by a contract which was contrary to the policy of the 10 Geo. II. c. 28; and under which he would have been subject to heavy penalties and punishments for exhibiting without such licence. If, however, the dances at the opera were not considered to come within that statute, then they fell within the prohibitions of 25 Geo. II. c. 36, s. 2, which enacts, "that every place, &c. kept for public dancing, &c. in London and Westminster, &c. without a licence from the quarter-sessions, shall be deemed a disorderly place," and persons found therein may be punished. And further, that the circumstance of the plaintiff's having another house licensed for different purposes could not avail, as the defendant had no notice of any other place than the Opera House communicated to him.

[243] *Erskine* and *Garrow* now shewed cause against the rule; contending that as the contract was for dancing only, it did not fall within the meaning of the 10 Geo. II. which prohibits "acting, representing, or performing for hire, gain, or reward, of any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage," without letters patent from the king, or licence from the Lord Chamberlain. * * * As to the statute of the 25 Geo. II. c. 36, it does not apply to this case; for the 4th section expressly provides that the act shall not extend to the Theatres Royal in Drury-Lane or Covent-Garden, or the theatre commonly called the King's Theatre in the Hay-Market.

Bower, contra, was stopped by the Court.

LORD KENTON, Ch. J. :

I think the statute of the 10 Geo. II.† does extend to this and every other species of stage entertainment. The words are general; and the intent of the Legislature manifestly was to put all places of public diversion under the control of the magistracy. The clause requiring a copy of the entertainment to be previously given to the Lord Chamberlain of course can only apply to such entertainments as are recited from written performances; and was intended as an additional check against a licentious use of the stage. Possibly the notion of the statute's being confined to such productions may have arisen from the occasion which is supposed to have given birth to it; and which was, some plays written by Mr. Gay and others, levelled against the existing administration, with intention of bringing it into disrepute with the people. The subsequent statute of the 25 Geo. II. puts all sorts of places opened for public diversion under the *direction and appointment of the magistrates at large; and is applicable to other entertainments than those of the stage. The exception in the 4th clause, that the Act shall not extend to the Hay-Market and the other two royal theatres, was inserted on a supposition that they would be licensed by the Lord Chamberlain; for the proviso goes on to say, "nor to such performances and public entertainments as shall be carried on by virtue of letters patent or licence of the Crown, or of the Lord Chamberlain." But the Legislature evidently did not mean to except these three places, unless they were licensed. Under the former Act no entertainment of the stage, of which dancing is one, can be exhibited without the Lord Chamberlain's licence; and none having been obtained in this case, the plaintiff cannot call upon the defendant for the breach of an agreement which, without such licence, it was unlawful for him to execute. As to the circumstance of other performers having recovered on similar agreements against the plaintiff for their salaries; those verdicts are right, for being engaged to the plaintiff and ready to execute

1793.

GALLINI
v.
LABORIE.

[*244]

† The Act of 10 Geo. II. is repealed by 6 & 7 Vict. c. 68, the enacting portions of which apply to stage plays only. But the case under 25 Geo. II.

is still an authority. The case is referred to in the judgment of *Wigan v. Strange* (1865) L. R. 1 C. P. 175, 183; 35 L. J. M. C. 31.—R. C.

1793.
GALLINI
v.
LABORIE.

the agreement on their part, they ought not to suffer because he did not obtain a licence, which it was his business to have procured.

ASHHURST, J. :

The Legislature did not mean by the statute 25 Geo. II. to give any magic virtue to the walls of the Opera House in the Hay-Market, but merely that that place, which was supposed to be licensed by the Lord Chamberlain, need not have any licence from the other magistrates. But that clause cannot extend to the Opera House, unless it be so licensed.

BULLER, J. :

As to the argument drawn from the words of the agreement, that the defendant was bound to dance at any other place, besides the Hay-Market theatre, which the plaintiff should appoint, it must be observed, that all the evidence points to that place alone. If the plaintiff had wished the defendant to dance elsewhere, he ought to have given him notice of it : but the only place specifically mentioned in the agreement is the Hay-Market theatre ; and it does not appear that the plaintiff required the defendant to dance in any other place.

GROSE, J. assenting,

Rule discharged.

1793.
May 7.
[246]

HARRISON v. BARNBY.

(5 T. R. 246—249.)

A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it; and if he do, the other tenant in common may distrain for his share.

IN replevin for taking the plaintiff's goods, the defendant avowed for a moiety of half a year's rent due on the 25th of March, 1792. * * * On the trial a verdict was given for the plaintiff, subject to the opinion of this Court, on the following case :

John Welles being seised in fee of the premises, upon which the distress was made, on the 24th April, 1768, demised to the

plaintiff for a term which is not yet expired under the rent of 18*l.* payable on the 29th September, 25th December, 25th March, and 24th June. In February, 1792, John Welles died, having first devised one undivided moiety of the premises to the avowant and his wife, and the other undivided moiety to Dr. Maillard and his wife, as tenants in common and not as joint-tenants. On the 2nd of April, 1792, the avowant gave the plaintiff notice of his interest under the devise, and required him to pay the avowant a moiety of *what rent had then become due since Welles died. On the 4th of April Dr. Maillard indemnified the plaintiff against this claim and gave him notice not to pay that rent, or any which should afterwards become due, either to the avowant or to any person not authorised by him, Dr. Maillard; upon which the plaintiff paid him the whole rent. At the time of the distress there was only one quarter's rent, *viz.* 4*l.* 10*s.*, accrued due since the decease of the testator John Welles. Dr. Maillard is the sole executor of the will of John Welles; and the testator directed his debts to be paid in the first place. If the Court shall be of opinion that this payment is good as against the avowant, then the verdict to stand; otherwise a verdict to be entered on these issues for the avowant for a quarter's rent.

1793.
HARRISON
v.
BARNBY.

[*247]

Onslow for the plaintiff:

All those incidents which belong to joint-tenants, arising from unity of possession, belong also to tenants in common, in actions personal, as trespass, or for offences which concern their tenements in common, they may sue jointly, and recover jointly their damages. Lit. sect. 315. They may have a joint action of debt for rent, and not divers actions. Sect. 316. They may join in debt or covenant for rent. *Midgley v. Lovelace*, Carth. 289. Then if they may sue jointly, payment to one is payment to all. In this case in particular this should be considered as a good payment, because the plaintiff holds under one title, which he took from the devisor, and not under several demises from the different persons who now claim under him. The plaintiff could not know the extent of their several claims, or apportion their several parts of the rent. In *Pullen v. Palmer*,† it was held that

† 3 Salk. 207; Carth. 328, S. C.

1793.
HARRISON
v.
BARNBY.

[*248]

an avowry by one joint-tenant was bad, "because it was upon the right, and the right of the rent was in all of them." There, indeed, Lord HOLT said, that tenants in common must sever in avowry : but he gave this reason, "because it goes to the realty ; and therefore if three tenants in common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more." But this shews that though they must sever upon the record, and set out their interests distinct, one alone cannot avow independently of the others.—In answer to a question from Lord KENYON, Whether, according to Lit. sect. 314, and 317, tenants in common must not sever in avowry, because "it is in the realty," he said that those passages only meant that one could not avow for the whole, but that they must each allege *their titles distinctly. And that one tenant in common cannot alone distrain and avow for rent is clear from the stat. 4 Ann. c. 16, s. 27, which gave an action of account to one tenant in common against another ; for if one alone could have distrained, it would have been nugatory to have given this action, since he would have had a speedier remedy.

Bailey, contra :

The authorities cited by the plaintiff only prove that tenants in common may sue jointly in certain actions ; but it does not follow from thence that payment to one alone is a good payment, nor that they must sue jointly. And indeed, it has been held that where the injury is separate, they may have several actions. It was determined in *Goodtitle v. Tombs*† that one tenant in common may maintain an action of trespass for the mesne profits even against the other tenant in common ; in *Cutting v. Derby* ; that one tenant in common may sue for the double value of his moiety of the rent under the stat. 4. Geo. II. c. 28 ; and in 2 Ld. Raym. 341, that tenants in common may either join in debt for the rent, or sever. In *Cutting v. Derby* the Court said, "where one entire injury is done to both tenants in common, they shall have one entire remedy : but where the injury is separate, they may have several actions." Now the non-payment of rent is not an entire injury to both ; but the non-

† 3 Wils. 118.

† 2 Bl. Rep. 1077.

payment of a moiety of the rent is a distinct injury to one only. But however this may be in general, in this case the plaintiff had notice from the defendant of his interest in the premises, with a request to pay him a moiety of the rent due. And the whole of the plaintiff's argument is founded on a supposition that the plaintiff was ignorant of the respective interests of the tenants in common; but the notice given by the defendant invalidates the payment as to one moiety. Besides the notice given to the plaintiff by Dr. Maillard, claiming the whole rent, is an ouster of the avowant, with respect to one moiety of the rent. Co. Lit. 248, b; 878, b. Actual ouster by force is not necessary; an adverse possession, or taking the whole profits, is sufficient. *Doe d. Fishar v. Prosser*, Cowp. 217.

As to the other point respecting the avowry for half a year's rent, when only a quarter's rent was due, the Court were satisfied that there was nothing in the objection.

Onslow, in reply :

The notices given by the avowant and Dr. Maillard are rather in favour of the plaintiff than against him, because they were contrary claims, the legality of which he could not determine; it was sufficient for him, as a mere terre-tenant, ignorant as he must have been of their titles, since he did not hold under a demise from them, to pay to either. Nor can Dr. Maillard's claim and receipt be considered as an ouster of the avowant. Co. Lit. 199, b, and *Fairclaim d. Empson v. Shackleton*, 5 Burr. 2608.

LORD KENYON, Ch. J :

This case does not disclose facts sufficient to raise any question on the will of the deviser J. Welles; it not being stated what charges were upon the estate, or whether there were any debts unpaid, &c. But the single question referred to the Court is, Whether the payment of the whole rent to Dr. Maillard be a good payment in prejudice of the other tenant in common, the avowant. In point of justice it is obvious that this case should be determined in favour of the avowant, who is entitled to a moiety of the rent, and who has done every thing in his power

1793.

HARRISON
v.
BARNBY.

[249]

1793.
HARRISON
v.
BARNBY.

to obtain payment, and that it should be against the plaintiff, who, in direct opposition to the claim of the avowant, and to justice, has ventured to pay the whole rent to the other tenant in common, Dr. Maillard. Several cases have been cited which, it is not necessary to consider here: it is unnecessary to discuss the question, What acts by one tenant in common may amount to an ouster of the other? That tenants in common ought to avow for their separate portions, is clear from the sections in Littleton; though they may join in actions on joint contracts, as in covenant, where the covenant is entered into with both, or in debt for rent, &c.; but in order to maintain the plaintiff's case, it was necessary for him to prove that a terre-tenant may pay the whole rent to one tenant in common, not only without the concurrence of both, but contrary to the express notice of the other. But no case, no resolution in the books, has been cited to warrant such a position; and all the analogous cases are the other way. Therefore the justice of the case, and arguments from analogous cases, being with the avowant, and this payment having been made after notice and against conscience, I am of opinion that the avowant is entitled to our judgment.

1793.
May 11.
[260]

MITCHELL v. WALKER.

(5 T. R. 260—265.)

In debt on 2 & 3 Ed. VI. c. 13, for not setting out tithes, where the declaration stated that they were within forty years next before the statute of right yielded and payable, and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe is not sufficient to defeat the action.

DEBT for not setting out tithes under the 2 & 3 Ed. VI. c. 13. The declaration stated that the plaintiff was rector of the parish of Thornhill, and as such was entitled to all manner of tithe within the same, except, &c.; and that the defendant on 1st January, 1791, occupied twenty-two acres of land called Head-field Closes within the said parish, and that the tithes of corn and grain yearly arising from the said land of the defendant's

within forty years next before the making of a certain Act of Parliament made in the 2 & 3 Ed. VI. intituled "An Act for Payment of Tithes," and then were of right yielded and payable, and yielded and paid, to the rector of the said parish, &c.; and that defendant being so occupier, and the plaintiff so being rector, &c. he the defendant on 1st November, 1791, *ploughed his said land and sowed the same with corn, &c. and afterwards, &c. reaped, &c. the tithe of all which said corn, &c. did of right belong and appertain to the plaintiff as rector as aforesaid, and of right ought to have been separated from the other nine parts thereof, and to have been yielded and paid to him; yet the defendant well knowing the premises, but not regarding the statute, &c. did not justly divide, &c. the tenth part of the said corn, &c. but took and carried away all the said corn, &c. before it was divided, &c. contrary to the statute; the declaration then alleged the value of the tithe taken away to be 4l. 8s. and demanded treble the value. The defendant pleaded *nil debet*, on which issue was joined.

1793.
MITCHELL
v.
WALKER.

[*261]

This cause was tried at the last York assizes before Buller, J. when it appeared that the land in question, which was within the parish, as far back as any witness knew had been in grass, and had been ploughed for the first time within their knowledge in 1791; and no evidence was given of its ever having paid tithe.

The statute 2 & 3 Ed. VI. c. 13, enacts, "That every of the king's subjects shall from thenceforth truly and justly, without fraud or guile, divide, set out, yield, and pay, all manner of their predial tithes in their proper kind, as they arise and happen, in such manner and form as have been of right yielded and paid within forty years next before the making of this Act, or of right or custom ought to have been paid; and that no person shall from henceforth take or carry away any such or like tithes which have been yielded or paid within the said forty years, or of right ought to have been paid in the place or places tithable of the same, before he hath justly divided or set forth for the tithe thereof the tenth part of the same, &c. under the pain of forfeiture of treble value of the tithes so taken or carried away."

1793.

MITCHELL
v.
WALKER,

Chambre for the defendant contended at the trial that the jury were bound to find for him, unless they found that tithes had actually been paid in respect of this land within forty years before the statute, of which there was no evidence : on the contrary the evidence given rather went to rebut such a presumption, and was sufficient to warrant the jury in presuming a grant in favour of the defendant. A verdict however was given by the learned judge's direction for the plaintiff, with liberty to the defendant to move to enter a nonsuit, if the Court should think the evidence insufficient to support the action.

[262]

A rule having since been obtained to enter a nonsuit,

Law now shewed cause against it :

There is no case wherein it has been held necessary to prove that the lands had paid tithe within forty years next before the statute of Ed. VI. in order to maintain such an action as the present. Lord Coke, 2 Inst. 649, 650, treating of this branch of the statute, takes no notice of it. The presumption of law is that all land is tithable ; and the *onus* of proving an exemption in favour of any particular land lies on the party claiming it : nor has it ever been held sufficient to show that the land has not paid tithe before within living memory ; though that sort of evidence may be applicable to identify lands in old deeds which were discharged of tithe by some legal exemption ; but here no such evidence was given. He was then stopped by the Court, as were also

Cockell, Serjeant, and *Lambe* on the same side.

Chambre and *Wood*, *contra* :

The objection that there was not sufficient evidence to support the action is decisive ; 1st, on the words of the statute ; 2ndly, on the authority of cases ; and, 3rdly, on the presumption of a grant. 1. The words of the statute are express that no person shall take away the predial tithe which hath been yielded or paid, or ought to have been paid within forty years next before the making of the Act, &c. * * *

2ndly, the case of *Lord Mansfield v. Clarke*,† M. 9 Geo. III. C. B. is decisive that some evidence of payment having been made within forty years next before the statute is necessary. The Court there granted a new trial for the defect of such evidence for the plaintiff. In the argument of that case was cited another of *Adenbrooke v. Stokes*, tried before Lord Ch. J. Willes at Stafford Assizes, 1745, which was a similar action on the statute 2 & 3 Ed. VI. for subtraction of tithes; where the learned judge non-suited the plaintiff for not proving payment of tithes within forty years before the action, in analogy to the limitation of time in the statute. And that decision was cited by Mr. Wilbraham before Lord Hardwicke in the case of *Rotheram v. Fanshaw*,‡ and approved by the Court. 3rdly, The non-payment of tithes within memory was evidence of a grant of the tithes. It was so considered in the case of *Lord Mansfield v. Clarke*. * * *

1793.
MITCHELL
v.
WALKER.
[*263]

LORD KENYON, Ch. J. :

Since it is necessary for us to give our opinion, I confess my inclination is strongly in support of the action; for though the defendant's argument would have great weight if we were now to decide on the statute of Ed. VI. for the first time, yet the usage has constantly been against the necessity of the proof contended for by the defendant under the statute. And I remember many actions tried, where the lands in respect of which the tithes were claimed were lately inclosed, and where the same objection, had it been available, must have prevailed, but the plaintiffs recovered in all of them. The statute of Ed. VI. was passed soon after the dissolution of the religious houses in this kingdom, before which time the tithes were in the hands of religious men, and the usual remedy for the subtraction of them was in the Ecclesiastical Courts. But when tithes became lay fees, it was thought necessary to provide a remedy for such injuries in the Temporal Courts, and therefore the statute was passed for that purpose. Now, it is not disputed but that these lands are tithable, and that payment may be enforced by a more expensive mode of proceeding. Laymen cannot prescribe in *non-decimando*. The non-

† Reported in a note to 5 T. R. 264.

‡ 3 Atk. 628.

1793.

MITCHELL

v.

WALKER.

[*264]

payment of tithe of itself signifies nothing: tithe is every day claimed for lands inclosed out of wastes which never paid tithe before. The only objection then is to the form of the action, which I do *not think well founded. The words of the statute extend to tithe paid, “or which of right or custom ought to have been paid.” Now what ground have we for saying that tithe ought not to have been paid here? The presumption of law is in favour of the rector. And I never heard that a different sort of proof of title was required in this from any other form of proceeding for the recovery of tithes. Mr. Justice YATES in a case, the name of which I think was *Kynaston v. Dickson*, thought the same evidence applicable in this as in any other case. In the case cited of *Lord Mansfield v. Clarke*, the declaration was drawn differently from the present; for there it was only stated that the tithes had been paid within forty years before the statute; the Court went on that distinction; and they ordered the declaration to be amended before the second trial, and the word “payable” to be inserted.

BULLER, J.:

With respect to the presumption of a grant in favour of the defendant, I thought I could not leave that question to the jury without some evidence to support it, and here was none. If indeed it had appeared that this land had been ploughed before, and yet no tithes had been exacted for it, that might have afforded some ground for such a presumption: and according to my note of the case of *Lord Mansfield v. Clarke*, [which Mr. Justice BULLER here read] † great stress was *laid upon that circumstance by Lord Ch. J. WILMOT, for he said “If it appear that this land has never paid, and has been constantly ploughed, it will be open to presumption of a grant.” But he thought that the *onus* of proving the exemption lay with the defendant.

[*265]

The other Judges concurring,

Rule discharged.

† The note will be found in 5 T. R. p. 264.

BENNETT v. MELLOR.

(5 T. R. 273—276.)

1793.
May 11.

[273]

If an innkeeper refuse to take charge of goods till a future day because his house is full of parcels, still he is liable to make good the loss if the owner stop as a guest, and the goods be stolen during his stay.†

THE defendant was an innkeeper, against whom the plaintiff brought his action for the value of goods stolen out of the inn. At the trial before Buller, J. at the last Lancaster assizes, it appeared that the plaintiff's servant had taken the goods in question to market at Manchester, and not being able to dispose of them went with them to the defendant's inn, and asked the defendant's wife if he could leave the goods there till the week following [meaning the next market day]; she said she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor immediately behind him. When he got up, after sitting there a little while, the goods were missing. A verdict was found for the plaintiff; and in reporting this *case upon a motion for a new trial, BULLER, J. observed that he was of opinion that if the defendant's wife had accepted the charge of the goods upon the special request made to her, he should have considered her as a special bailee, and not answerable in this case, having been guilty of no actual negligence; but that not being the case, he considered this to be the common case of goods brought into an inn by a guest, and stolen from thence, in which case the innkeeper was liable to make good the loss.

[*274]

[*Walton* shewed cause against a rule for setting aside the verdict. An innkeeper is by the common law liable to answer for all goods lodged in his inn by his guest (42 Ed. III. 11, a, *Calve's* case, 8 Co. 32); and cannot discharge himself from such liability by alleging that he left the goods under the special care of the guest himself. Neither is this protection confined to the goods of persons going to and continuing in the inn as

† Compare *Strauss v. County Hotel Co.* (1883) 12 Q. B. D. 27; 53 L. J. Q. B. 25.

1793.

BENNETT
v.
MELLOR.

guests ; for if a person carry a horse to an inn and there leave him, the innkeeper is liable to make good any loss. *York v. Grindston*, Salk. 388 ; 2 Ld. Ray. 868. It appears also from *Calye's* case that it is not necessary to prove negligence in the innkeeper ; but he must discharge himself by shewing negligence or fraud in the guest.

[275]

Law and Topping, contra, argued for a new trial on two grounds ; 1st, That the innkeeper refused to take charge of these goods, for which the plaintiff could not recover in this action, which charged the defendant with having undertaken the care of them. But, 2ndly, all the books agree that where goods are delivered to an innkeeper for a different purpose than to take charge of them as of the goods of a guest, no action will lie for any implied negligence. 1 Rol. Abr. 3, Action sur Case, E. I. So in Dy. 158, b. In the present case, the plaintiff came to ask a favour as a neighbour and not as a guest ; and then, say the books, the innkeeper shall not be charged for a loss of goods. 8 Co. 32 ; 1 Com. Dig. 229. And in another passage in Com. Dig. 229, it is said that the action does not lie “ if the goods are lost without any fault of the innkeeper.”]

ASHHURST, J. * :

It does not appear to me that there is any ground for granting a new trial. If it had appeared, as the defendant's counsel have suggested, that these goods were lost through the mere negligence of the plaintiff's servant, the case might have deserved greater consideration : but nothing of that kind appears on the Judge's report. According to the report, the case was simply this ; the plaintiff's servant came to the inn, and desired to have the liberty of leaving the goods, which he could not dispose of in the market, until the next week ; that proposal was rejected ; then he sat down in the inn as a guest, with the goods behind him, and during that time the goods were taken away. But, although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest.

* Lord Kenyon was gone to Guildhall before this case was called on.

BULLER, J. :

Although the defendant refused to take charge of the goods until the next week, the circumstances of this case distinguish it from that cited, where the innkeeper said his house was full, and refused to take in the guest: that, if true, is a good excuse; and if false, the innkeeper is liable to an action for refusing to take in the guest. But here the request was merely to take care of the plaintiff's goods until the next week: if the defendant had taken the goods upon that request, he could only have been liable as a bailee: but that proposal was not accepted, and then this case stands on general grounds. It is clear that the goods need not be in the special keeping of the innkeeper in order to make him liable: if they be in the inn, that is sufficient to charge him. In *Calye's* case it is said, "Although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away or *stolen, the innkeeper shall be charged; and therewith agrees 42 Ed. III. 11, a." There it is said, that on the words of the writ the innkeeper is answerable for every thing in his inn, but not for a horse, which the owner orders to be put out to pasture. One of the passages cited from Com. Dig. cannot be supported if taken in a general sense; for all the authorities agree that it is not necessary to prove negligence in the innkeeper.

GROSE, J. :

Calye's case, which is a good comment on the writ which gives this action, decides this present case. According to that, if a man go into an inn and is accepted there as a guest, the innkeeper is bound to take care of the goods of the guest: and so says the case in *Dyer*. If indeed the innkeeper had refused to take in the plaintiff's servant as a guest, and he had notwithstanding gone into the inn, the plaintiff could not have charged the defendant with the loss of his goods: in such a case the innkeeper refuses at his peril, and if it be without reason, an action lies for the refusal: but in this case there was no refusal of the person; the defendant merely refused to take care of the goods until the next week. And when the plaintiff's servant was sitting in the inn, with the consent of the innkeeper, (for the

1793.

BENNETT
v.
MELLOR.

[*276]

1793.
BENNETT
v.
MELLOR.

latter did not object to receive him,) he was in the same situation as any other guest, and entitled to the same protection for his goods.

Rule discharged.

1793.
May 13.
[276]

J. FOX, EX PARTE.
(5 T. R. 276—277.)

A sea-faring man, serving the office of headborough, is not thereby exempted from being impressed.

SHEPHERD obtained a rule to shew cause on a former day why Fox should not be brought up by *habeas corpus*, in order that he might be discharged out of custody of a press-gang, on an affidavit stating that he was headborough of the place in which he was resident at the time of his being impressed.

Broderick now shewed cause, contending that this was no cause of exemption for a sea-faring man, as this person was sworn to be. If this were admitted as a sufficient excuse, the same plea would be urged in a variety of instances where persons had civil duties cast upon them; and it would become very difficult to draw the line. The Legislature having in certain instances, of which this was not one, declared that particular persons in the sea-faring line should not be impressed, *the Court ought not to extend the exemption further than the Legislature have thought proper to do.

Shepherd, in support of the rule, said that the case of this party was very different from such as voluntarily took upon themselves the execution of any civil duty; here an office of considerable importance to the police of the country was imposed upon him by law, which he was bound to execute, and punishable if he did not. He admitted that he had not found any case upon the subject; but contended that the argument was well founded on principles of policy and justice. The law could not compel a man to exercise two incompatible functions at the same time; and as it was clear that he had no legal excuse for not taking upon him the office of headborough at the time when

he was chosen to that office, but was compellable so to do, it followed that he could not be also compellable to serve in another incompatible employment.

1793.

J. Fox,
Ex parte.

LORD KENYON, Ch. J. :

The right of pressing is founded on the common law, and extends to all persons exercising similar employments with the defendants. Any exemptions, therefore, which such persons may claim must depend upon the positive provisions of statutes. Now those only extend to apprentices under certain circumstances : but no provision is made for any such exemption as is now set up ; and unless any such can be shewn, or some case cited wherein it has been heretofore allowed, we cannot admit of it in the present instance.

BULLER, J. :

I believe the only excepted case in the books, which does not rest on the statute law, is that of a ferryman, who it is said in one old case is exempted from being impressed.

Per CURIAM :

Rule discharged.

THE KING *v.* MOSES SOPER.

(5 T. R. 278.)

1793.

May 13.

[278]

If the putative father of a bastard obtain the possession of her from her mother by fraud, the Court will order her to be restored to the mother.

A CHILD of three years of age being brought up at the instance of her mother, on an *habeas corpus*, by the putative father, on whom an order of filiation had been made, and who had obtained the possession of the child by fraud,

Burrough objected to the child being restored to the mother, on the ground that, as the child had been adjudged to be the child of Soper, he had a right to the custody of her. But

LORD KENYON, Ch. J. (stopping *Garrow* and *Dampier*, *contra*), said that the putative father had no right to the custody of the child ; and she was accordingly restored to the mother.

K. B. TRINITY TERM.

GRIFFITH *v.* MATTHEWS.

(5 T. R. 296—298.)

1793.
June 5.

[296]

Uninterrupted possession of a pew in the chancel of a church for thirty years is presumptive evidence of a prescriptive right to the pew in an action against a wrong-doer; but that presumption may be rebutted by proof that the pew had no existence thirty years ago.

THIS was an action on the case for disturbing the plaintiff in a pew in the chancel of Llanover church; and the plaintiff in his declaration stated that he was possessed of a certain ancient messuage, &c., with the appurtenances in the parish of Llanover, and claimed the use and benefit of this pew for himself and his family inhabiting in the said messuage, as belonging and appertaining to the said messuage, &c. At the trial at the last Monmouth assizes before Grose, J. it appeared that in 1758, in consequence of a dispute between the wife of T. Matthews, under whom the plaintiff claimed, and one Pritchard, both tenants of Hanbury, respecting a seat in the body of the church, the vicar by way of accommodation offered to give up a place for a seat in the chancel for the use of Matthews, and to provide the materials, if Hanbury would defray the expense of erecting a pew there. This offer was accepted; and a new pew was made in the chancel, Hanbury paying for the work: but at this time T. Matthews was the occupier of another farm of his own in the same parish. The place where the new pew was made, was before that time an open seat; an old parish chest being there, and two or three indifferent persons, neither connected with Hanbury or Matthews, usually sitting there as well as Matthews. After the building of this pew in 1758, T. Matthews continued in possession until the time of his death, about seven years ago; and since that time it was constantly occupied by the family of the Matthews's until this action was brought. T. Matthews devised his estate to his son W. Matthews, *who conveyed to the plaintiff; but no mention was made of this pew in the conveyance. GROSE, J. in reporting the facts of this case on a

[*297]

motion for a new trial, said, that at the trial he had doubted whether the plaintiff could claim a prescriptive right to a pew in the chancel, but that he was since convinced that there was no foundation for that doubt; and that he had left it to the jury to consider whether or not under all the circumstances of the case this pew, so erected in 1758, was appurtenant to the plaintiff's ancient messuage; who found that it was not, and gave a verdict for the defendant.

1793.
GRIFFITH
v.
MATTHEWS.

Bower and Lane were to have shewn cause against a rule for a new trial: but

Miles was called upon by the Court to support his rule. And he contended that in a possessory action against a wrong-doer it was not necessary to prove the prescription correctly; that it was sufficient to rely on a colourable title. [He cited *Stocks v. Booth*,† and *Rogers v. Brooks*.‡]

LORD KENYON, Ch. J.:

This was a question for the consideration of the jury, who appear to me to have decided it rightly. In the case cited of *Rogers v. Brooks*, where the pew had been enclosed forty years, there was evidence to go to the jury to prove that it was an immemorial and not a new right; and Lord MANSFIELD seems to have considered the case in that light. But here the plaintiff has declared on a prescriptive right, and shewn the commencement of it in very modern times. And though a plaintiff need not support such a claim as this against a wrong-doer with the same strength of evidence that it would be necessary to give in an action against the ordinary, yet here the pew is claimed as appurtenant to an ancient messuage, and it appears that the pew itself has only existed since 1758.

ASHHURST, J.:

This does not come within the legal idea of a prescription. The pew cannot be said to be appurtenant to an *ancient messuage, as it had its origin only in the year 1758, and even then it was built by way of accommodation.

[*298]

† 1 T. R. 428; R. R. vol. i. p. 244.

‡ 1 T. R. 431, n.

1798.

BULLER, J. :

GRIFFITH
v.
MATTHEWS.

A seat in a church may be annexed to a house either by a faculty, or by prescription ; and from long uninterrupted usage a faculty may be presumed. It is impossible to determine *a priori* what evidence will or will not be sufficient to support such a right : it must vary in each particular case. Evidence of continued possession since the year 1758, unanswerd and unexplained, would have been sufficient to support the plaintiff's claim. But the case stood thus ; there was evidence, whether weighty or not it is not necessary for us to decide, that those under whom the plaintiff claims had a seat belonging to their house in the body of the church ; there was also some evidence that they used a seat in the chancel. If the case had rested on this only, it would have been a question of evidence for the determination of the jury : but it also appears that prior to 1758, when this pew was erected, there was no pew at all in the chancel ; and that the old open seat was occupied by different persons. If it had not appeared when or at whose expense this pew was built, or that it had not been a pew at all before 1758, possession from that time would have been sufficient evidence to have warranted the jury in presuming that a faculty had been granted to the plaintiff's ancestor to build this pew in the chancel : but those circumstances were proved, and they destroyed the presumption.

GROSE, J. :

I agree with the defendant's counsel that the jury ought to have presumed everything, which they could fairly have presumed against a wrong-doer : but here all ground for presumption was taken away by the facts disclosed at the trial. The question was, Whether or not there was evidence that this pew was appurtenant to an ancient messuage ? and that was negatived by proving that the pew was only built in 1758. And in reality the pew was erected for the personal accommodation of the family of the Matthews, to put an end to a dispute between them and the Pritchards.

Rule discharged.

DENN, ON THE DEMISE OF JOHN WEBB, *v.* PUCKEY
AND OTHERS.
(5 T. R. 299—306.)

1793.
June 7.
[299]

By a devise to A. for life without impeachment of waste, and after his decease to the issue male of his body and to the heirs and assigns of such issue male for ever, and for default of such issue male to B., &c. ; A. takes an estate tail.* But supposing he only took for life, yet as the remainder to his issue and the subsequent remainders are contingent, they may be barred by a recovery suffered by A. before any issue born.

In ejectment for certain lands in the parishes of Lancells and Whitestone in the county of Cornwall, tried at the last Launceston assizes, a verdict was taken for the plaintiff, subject to the opinion of the Court on a special case. Walter Husband, by will dated May 2, 1763, devised these estates to his grandson Nicholas Webb for life, without impeachment of waste, and after his decease to the issue male of his body lawfully begotten, and to the heirs and assigns of such issue male for ever ; and for default of such issue male then to his grandson W. Webb for life, with remainder to the issue male of his body and the heirs and assigns of such issue male ; and for default of such issue male, then to his grandson J. Webb (the lessor of the plaintiff) for life, with remainder to his issue male in like manner. On the death of the deviser, N. Webb entered on the premises ; and having suffered a recovery of them to the use of himself in fee, devised them to W. Webb in fee. N. Webb died in 1774, upon whose death W. Webb entered ; and he or his widow have been in possession ever since. W. Webb was the eldest grandson of the deviser and his heir at law ; and the defendants derive title from him. J. Webb the lessor of the plaintiff claims under the will of W. Husband ; both Nicholas and William Webb being dead without issue.

[*East*, for the plaintiff, argued that recovery suffered by Nicholas Webb was void, and a forfeiture of his estate ; he being only tenant for life at the time.

Eliot, contra, contended that this case fell directly within [302]

* Compare *Morgan v. Thomas* (1882) 8 Q. B. D. 575 ; 9 Q. B. D. 643.

1793.
 DENN
 v.
 PUCKEY.

that of *Roe v. Grew**; the principle there established being that annexed words of limitation to the devise to the issue did not prevent the usual operation of the word "issue" from giving an estate tail to the first devisee to whom it related, although the first limitation to him was for life. But at all events the lessor of the plaintiff would be barred by the recovery suffered by N. Webb, even admitting that he was only tenant for life; for according to the doctrine in *Loddington v. Kine*,† the remainder to the issue, and consequently all the subsequent remainders were contingent, and might be barred by a recovery suffered by the tenant for life before issue born.

[*303] *East*, in reply, argued that the case of *Loddington v. Kine* went on the ground that the remainder over could not be *vested, because the prior limitation to the issue of the first taker was in fee; and a fee could not be mounted upon a fee; but no such objection applies here to prevent the remainder to J. W. from vesting. And as to the case of *Roe v. Grew*, he contended, that though that case might be good law as far as it went upon the nature of the limitation to the issue being the same according to either construction there contended for, yet beyond that there was no authority to support it.]

LORD KENYON, Ch. J.:

Nothing can be clearer than that the first intention of the deviser was to give only an estate for life to N. Webb, for it is given to him "for life" in express words; and these words are immediately subjoined, "without impeachment of waste." But it has been for a long time, and very properly, settled that if a deviser, ignorant of technical terms, sitting down to draw his own will, make clashing limitations, the Courts, in construing that will, must depart from some particular limitations, in order to give effect to the general intention of the deviser. That was solemnly decided and anxiously inserted in the certificate in *Robinson v. Robinson*‡; the determination of which case here was afterwards confirmed in the House of Lords. Now what was the general intention of the deviser in this case? It was,

* 2 Wils. 322.

† Salk. 224.

‡ 1 Burr. 38.

that the male descendants of his grandson N. Webb should take the estate, and that none of those, to whom the subsequent limitations were given, should take until all the male descendants of N. Webb were extinct. That being the general intention of the devisor, let us see by what construction that will be best effectuated. It has been contended by the plaintiff's counsel that N. Webb only took an estate for life; if so, What estate was given by the words "to the issue male of his body lawfully begotten, and to the heirs and assigns of such issue male?" Was it to extend to more than one son? It would be difficult to extend it to more than one; and I conceive that the eldest must have taken the absolute interest in the estate. But that would defeat the devisor's *intention, because it might have descended to the general heirs of that one son to the disinheriting of the other issue male of N. Webb. But even if these words comprehended all the male issue, as tenants in common, in tail, that would not have answered the devisor's intention, because there are no words to create cross remainders between them. And as his intention was, that all the descendants of those children should take before the remainder-men, that intention would be defeated by letting in any of the remainder-men while there were any of the descendants of N. Webb in existence. All these observations were made by Lord Ch. J. WILMOT, in the case cited from Wilson, of which I have a fuller manuscript note. I am therefore perfectly satisfied that the devisor's intention will be best answered by our deciding that N. Webb took an estate tail, which will comprehend all his issue male, and that none of the limitations over could have taken place while any of his issue were living. In addition to the authorities cited there is another in support of our determination, which came before the Privy Council, by appeal from Barbadoes in 1730, *Morris v. Le Gay*.† There the devise was "to A. for life, then to the heirs of the body of A. and their heirs; and if she died without such heir of her body, then over." The counsel, who argued that case, were *Mr. Fazakerly* and *Sir D. Ryder*; and the Lords of the Council, assisted by Lord Ch. J. RAYMOND, and Lord

1793.

DENN

v.

PUCKEY.

[*304]

† *Vide* 2 Burr. 1102.

1793.
 DENN
 v.
 PUCKEY.

Chief J. EYRE, determined that it was an estate tail in the first taker.

But there is another way of considering this question; and it has been argued by the defendant's counsel, on the authority of *Loddington v. Kine*, that by the limitation "to N. Webb for life, remainder to the issue male of his body and to the heirs and assigns of such issue male for ever," the issue of N. Webb took a fee as purchasers; and in none of the cases cited by the plaintiff's counsel was the limitation over "in default of issue," as in this case, but "for want of heirs." And this differs this case from that in *Cro. Jac.* Then if this were a limitation to the issue in fee on a contingency with a double aspect, as it is called, the result here would be the same as in *Loddington v. Kine*, for then N. Webb was tenant for life, with a contingent remainder in fee to his children, if he had any, and if he had none, then a contingent remainder over; in which case, all the limitations over were destroyed by the recovery, which *destroyed the particular estate. And therefore *quâcunque viâ datâ*, without determining whether N. Webb took an estate in tail, or for life only, with a remainder to his issue in fee, the lessor of the plaintiff is not entitled to recover.

[*305]

ASHHURST, J. :

I entirely concur in opinion with my Lord, that, in whatever point of view this case is considered, the defendant is entitled to judgment. I believe it very rarely happens that where a man makes his own will, his whole intention can be effected: but of the two evils, perhaps it is the least that the intention of the devisor should be defeated in some particular point, than that judicial determinations, respecting real property, should be overturned. In addition to the cases already mentioned, I will refer to another, *Doe d. Brown v. Holme*,† where the devise was to "J. L. for life, and after his decease to the heirs male or female of the body of J. L. for ever;" and J. L. not having had any issue, suffered a recovery; Lord Ch. J. DE GREY, who delivered the opinion of the Court, said, that *quâcunque viâ datâ* the re-

† 2 Bl. Rep. 777.

covery vested an estate in fee in J. L., for if it were an estate tail in him, there could be no doubt; and if he had only an estate for life, with remainder in fee to his heirs male or female, then being a contingent remainder it was destroyed by the common recovery; and all the subsequent remainders depending thereon were barred, according to the case of *Loddington v. Kine*. To that case, which is very much like the present, and which was much investigated, I subscribe; and I am of opinion that at any rate the lessor of the plaintiff is barred by the recovery.

1793.
 DEKN
 v.
 PUCKEY.

BULLER, J.:

I entirely agree, that either on one ground, or the other, the defendant is entitled to our judgment. The case cited by my brother ASHHURST from Bl. Rep. only differs from the present in this respect, that there the limitation was to "the heirs of the body," and here it is to "the issue of his body." So in *Goodright v. Pullyn*,† and in the case from Barbadoes, the words were, to the "heirs male of the body," &c. Now if there be no difference between the words "issue male" and "heirs male," those are direct authorities for the present case. In some cases a distinction certainly has been taken between the effect of those words: but according to my note of *Roe v. Grew*, Lord Ch. J. WILMOT thought there was none. The passage cited by the plaintiff's counsel from Fearné does not *assist his purpose; for as a continuation of the same passage the author goes on to say, "But we must take care to confine this observation to those cases where the ingrafted words described an estate descendible in a different course, and to different persons as special heirs, from what the first would carry the estate to, viz., to males instead of females, or *vice versa*; for where the first words give an estate tail general, and the words ingrafted thereon are words serving to limit the fee, it seems by the general and better opinion that the annexed words of limitation are not to be attended to; as may be seen in the above cases of *Goodright v. Pullyn*, *Wright v. Pearson*, and *King v. Burchall*, where the ingrafted words limited the whole

[*306]

† 2 Ld. Raymond, 1437.

1793.
DENN
v.
PUCKEY.

fee." That book, therefore, instead of its being an authority for the plaintiff, is strongly against him. But even supposing that this was a limitation in fee to the children, and that the devise to the issue male could not be coupled with the preceding estate for life, still the recovery would be a bar to the lessor of the plaintiff's remainder, which was contingent, according to *Loddington v. Kine*. Therefore, either way, the defendant is entitled to retain possession.

GROSE, J. :

I observe that there is a distinction in some of the cases between the words "issue of the body" and "heirs of the body:" but in *Roe v. Grew*, GOULD, J. commenting on the operation of the word "issue," thought otherwise, and that it was more properly a word of limitation than of purchase. And that case comes so near to the present that I think there is no real distinction between them.

LORD KENYON, Ch. J. :

There is no doubt but that the words "heirs of the body" may be controlled by subsequent words; that was so held in *Law v. Davis*,* and in a variety of other cases; and yet it is worth remembering, as a matter of curiosity, that Lord HOLT and Lord SOMMERS thought that they could not be so restrained by any subsequent words as to carry less than an estate tail.

Per CURIAM :

Postea to the defendant.

* 2 Str. 849.

DOE, ON THE DEMISE OF E. PHIPPS, *v.* LORD
MULGRAVE.

(5 T. R. 320—325.)

1793.
June 7.
[320]

A. devised his estates real and personal “in trust to trustees for his brother B. and his first and every other son in tail male; failure of such issue to his brother C. and his first and every other son in tail male, &c. &c.; in all the foregoing cases without impeachment of waste, other than wilful;” and directed the renewals of a leasehold estate to be made “by the tenant for life;” held that B. took only a life estate, with remainder in tail to his children.

In ejectment for certain lands in the county of York, tried at the last York assizes before Buller, J. a special verdict was found, stating, that C. J. Phipps, Lord Mulgrave of the kingdom of Ireland, being seised in fee of the premises in question, and having only one child, a daughter, and three brothers of whom the present defendant, then and still unmarried, was the eldest; the lessor of the plaintiff the second, also unmarried; and A. P. then married, but without issue, the third; by will dated the 8th of October, 1792, devised his estates real and personal “in trust to T. Lord Longford, &c. &c. for my first and every other son in tail male; failure of such issue to my brother Henry and his first and every other son in tail male: failure of such issue to my brother Edmund and his first and every other son in tail male; failure of such issue to my brother Augustus and his first and every other son in tail male; failure of such issue to my daughter A. E. C. Phipps and her first and every other son in tail male; and in failure of such issue to her eldest daughter and her first and every other son in tail male; failure of such issue to her daughters respectively in succession; failure of such issue to the daughters of the last surviving Lord Mulgrave; in all the foregoing cases without impeachment of waste, other than wilful.” Then after making a provision for his daughter to the amount of 20,000*l.* the will proceeded thus: “My will is that the money lodged at Child’s to pay for the purchase of the Lyth rectory be applied for that purpose as soon as Sir J. Sheffield can *complete the title; and the renewals to be made by the tenant for life.” “I name for the executors in trust of this my will

[*321]

1793.
DOE
v.
LORD
MULGRAVE.

Mrs. A. J., my brother Henry Phipps, or whichever of my brothers may succeed to the estate," &c. The deviser died on the 9th of October, 1792. It further appeared by the special verdict that Sir J. Sheffield held the rectory of Lyth to him and his heirs and assigns for three lives under the Archbishop of York; that the deviser had, before the making of his will, entered into an agreement with Sir J. Sheffield for the purchase of the rectory for the remainder of the term, and that the purchase money was lodged at Child's the bankers, ready to be paid on the completion of the title. It then stated the seisin of the defendant; a recovery suffered by him to the use of himself in fee; and the demise of the lessor of the plaintiff, &c. &c.

S. Heywood, for the plaintiff, contended that the defendant only took an estate for life, with remainder in tail male to his issue. * * *

[322] *Lowndes, contra* :

The defendant took an estate in tail male, whether the words first and every other son be taken as words of limitation or of purchase. * * *

[323] LORD KENYON, Ch. J. :

The words "first and every other son," "children," or "heir," may be taken as words of limitation, where it is necessary to give them that construction in order to effectuate the intention of the deviser; as in *Robinson v. Robinson*: * though, ordinarily speaking, they are words of purchase. But in this case no doubt can be entertained respecting the deviser's intent. First he devised to his own "first and every other son in tail male;" and if he had no issue, "then to his brother Henry and his first and every other son in tail male," &c. Now if he had given instructions to a conveyancer to draw his will, and to make his brothers tenants for life, and their children tenants in tail, these are precisely the terms in which he would have given such constructions; and in construing wills, we must take into consideration the short hints of the deviser, in order to discover his intention.

To be sure if the objection, *voluit sed non dixit*, had occurred, it could not have been got over. We could not have inserted words in the will, which would have varied the construction of those used, even if we thought that the devisor intended to have used them : but here the intention is sufficiently explained by the words which he has used. And great weight is also due to the subsequent *words which direct the renewal of the life estate to be made “by the tenant for life ;” for they can only apply to the devisor’s brothers, since there was no other person who could take a life estate under the will. In some of the cases indeed nice distinctions have been made to whom the word “heirs” should be applied ; as in *Oates v. Jackson*,† *Wild’s case*,† &c. but without entering into those niceties, because it is unnecessary in this case where the devisor’s intention may be collected from different parts of the will, I am clearly of opinion that on the fair construction of the will the present Lord Mulgrave only took a life estate, with remainder in tail to his issue ; and consequently that, as the recovery suffered was a forfeiture of that life estate, the next brother, the lessor of the plaintiff, is entitled to recover.

1793.
DOE
v.
LORD
MULGRAVE.

[*324]

ASHHURST, J. :

The words “first and other sons” are not words of limitation, unless it be manifestly the intention of the devisor that they should be so construed : but here the intention was clearly otherwise. The devisor meant to give only an estate for life to the first taker ; and that this was his intention is confirmed by the subsequent clause, directing the renewal of the leasehold estate to be made by “the tenant for life.”

BULLER, J. :

This will, though expressed in short terms, is so clear that no person but a technical lawyer can entertain a doubt with respect to its meaning. It is an epitome of a strict settlement. The whole is inaccurate, for the devisor begins with giving his estates, not to trustees, but in trust to certain persons, and there is no limitation at all to their heirs. As to the principal question ; the

† 2 Str. 1172.

‡ 6 Rep. 16, b.

1793.
 —
 DOE
 v.
 LORD
 MULGRAVE.

[*325]

devisor has not said in express terms that he devised to his brother Henry for life, but it manifestly appears that it was his intention that his brothers should only take life estates. In this case we are not hampered by technical words, and we have only to consider the plain meaning of the devisor, which, I think, was to limit his estate in strict settlement to his brothers in succession. What is the course of a strict settlement? To make those who are living tenants for life, with remainder in tail to their unborn issue. A strong argument arises from the clause respecting impeachment of waste; for it is added "in all the foregoing cases without impeachment," &c. which applies to the estates given to all the brothers. It has been contended however, on behalf of the defendant, that the devisor only intended to prevent wilful *waste; but that was not the waste he had in view. The common acceptation of the word is destruction of houses, and not the waste which is usually provided against. The other clause about the renewal will bear two constructions; but, the intention of the devisor being apparent in other parts of the will, it is fair to put the construction on it for which the plaintiff contends. And the last clause, in which the executors are named, clearly shews that the devisor intended that his brothers should take in succession; for he appointed his brother Henry Phipps, or whichever of his brothers might succeed to the estate.

GROSE, J. :

The devisor has expressed in short terms that which conveyancers express very much at length. Instead of vesting his estate in trustees in legal language, he has said shortly what lawyers mean when they speak of limiting an estate in strict settlement. I have no doubt but that he meant to give his estate in strict settlement; and when once we know his meaning we must endeavour to give effect to it. That he intended that the first taker should only have an estate for life is evident for the reasons given by the plaintiff's counsel. It is not indeed an express devise for life; but the clause respecting the renewals by the tenant for life shews that he meant that the brothers should be tenants for life. In answer to this observation, it has been said that tenants in tail are also tenants for life, and that the

devisor did not mean by this expression to restrain the estates given to his brothers to be merely estates for life ; but, in common parlance, tenants in tail are not considered as tenants for life ; they are something more than tenants for life. On the whole I think that the devisor intended to give life estates to his brothers, with remainders in tail to their children.

1793.
DOE
v.
LORD
MULGRAVE.

Judgment for the plaintiff.

BURT v. MOORE.

(5 T. R. 329—335.)

1793.
June 11.
[329]

A. demised to B. the milk of twenty-two cows to be provided by A., and to be fed at A.'s expense on certain closes belonging to A. ; A. covenanting that B. might turn out a mare, and that no other cattle should be fed there : held that the separate herbage and feeding of those closes passed to B., and that B. might distrain other cattle of A. doing damage there.

To trespass for breaking and entering the plaintiff's closes and taking and impounding his cattle, the defendant justified taking the cattle as a distress, because they were doing damage on Axe Mead, of the separate herbage and feeding of which close he was lawfully possessed. There were four other similar pleas of justification to other trespasses on other closes charged in the declaration. The plaintiff replied *de injuriâ suâ propriâ*, &c. ; and on the trial at the last Dorchester Assizes a verdict was taken for the plaintiff, subject to the opinion of this Court on the following case :

The plaintiff was the occupier of an estate, called Axe, of which the several closes in the pleadings are parcel. John Burt, by indenture dated 3rd December, 1791, demised to the defendant a dwelling-house, &c., and also the milk and calves of 22 cows, provided and to be provided by Burt, and which should, at the expense of Burt, run, be fed, and depastured, on the following grounds on Axe farm, [stating them ;] To have and to hold the said dwelling-house, milk and calves of the said 22 cows, from the 13th of February then next for one whole year, yielding and paying therefor unto Burt, his executors, &c. 150*l.* &c. ; and

1793.
 BURT
 v.
 MOORE.
 [*330]

Burt covenanted with Moore, that if any cow should be wanting to make up the number of 22 at the commencement of the term, the same should be bought by Lady-day next; that if any of the cows should bring forth a *dead calf, he would allow 2s. 6d. for such dead calf; and also that he (Burt) his executors, &c. would allow to Moore, during the said term, sufficient hay and straw for such calves of the said cows as should be kept for drivers; that Burt would allow Moore to keep a mare, to be fed and run with the cows on the dairy; that if the dairy should not be full by the 5th of April, he would allow Moore, his executors, &c. 2s. 6d. each cow weekly, until the same should be full, and the cows have calves; and if any of the cows should lose their milk, or fail in their udders during the term, would make a reasonable allowance in case the same should happen before the 14th of November then next, but not after; and also that it should be lawful for Moore, his executors, &c. to feed and depasture the cows from the 21st of April to the 12th of May then next on the great watered meadow on Axe farm, and that no other stock than the 22 cows and the mare should feed and depasture on the said premises during the term, (except a bull to be put with the said cows on the 23rd day of April then next till the 13th of November then next,) and from which time till the end of the term Burt should stock the premises with sheep, if he should think fit. The defendant entered on the dwelling house, and took the milk and calves of such cows as were provided by the plaintiff pursuant to the terms of the indenture. During the continuance of the term, and at such times when the plaintiff had agreed not to turn other cattle besides the bull, and such cows of which the defendant was to take the milk and calves according to the terms of the agreement, into the closes in the plea mentioned, other cattle, to wit, several cows of the said plaintiff were found depasturing in the closes; and the defendant distrained them so depasturing, and impounded them.

Bond, for the plaintiff, after stating the question to be, Whether a person, who rents the milk of cows, which the owner covenants shall be fed in particular pastures, can distrain cattle belonging to the owner damage feasant in the same closes in

which the cattle were to feed, argued in the negative. This case is brought forward on the part of the defendant, on the authority of *R. v. Piddletrenthide*,† and *Rex v. Tolpuddle*;‡ in both which cases it was held that a similar interest with that claimed by the defendant was a tenement within the stat. 13 & 14 Car. II. c. 12, so as to enable the party to gain a settlement under it. But the principle, on which those cases were decided, is not applicable *to the present: those were merely decisions on the construction of a particular Act of Parliament, in which many circumstances were taken into consideration, which can have little weight in this case, in an action of trespass. * * *

1793.
BURY
v.
MOORE.

[*331]

Gibbs, contra, after saying that he relied on the two cases alluded to, was stopped by the Court.

[332]

LORD KENYON, Ch. J. :

As this question has been so recently discussed in the two cases cited, it is hardly necessary to repeat the grounds on which we decided those cases : and I see no reason to depart from the opinion which I gave when those cases were before the Court. This demise of the dairy is a *demise of the soil and exclusive use of all the grass that should grow on the closes particularly enumerated in the lease, to be taken, it is true, by the mouths of the plaintiff's cattle ; but those cattle were also demised to the defendant. If instead of the plaintiff's cattle, the defendant had rented the dairy from some other person, the *sola & separalis pastura* would undoubtedly have passed by such a demise as the present, notwithstanding it could only have been enjoyed in a particular manner. Otherwise, if a stranger were to turn his cattle on the land, what remedy would the person renting the dairy have, if he could not maintain an action of trespass against such stranger ? I am perfectly satisfied that, although the defendant was restrained by the agreement to a particular mode of occupation, he is to be considered as the occupier of the land ; and, being entitled to the sole use of the land, is also entitled to maintain trespass, or to justify distraining the plaintiff's cattle

[*333]

† 3 T. R. 772.

‡ 4 T. R. 671.

1793.
BURT
v.
MOORE.

damage feasant there. The proviso respecting the bull does not vary the question ; for the bull was taken to be an appendage to the dairy. With regard to the case of *R. v. Lockerly*, we thought that it could not be supported on principles of law, and expressed our opinions to that effect when we decided the case of *R. v. Tolpuddle*.

ASHHURST, J. :

The two cases alluded to go the full length of deciding the present. In those it was held that a right to the separate herbage gave the party renting it a settlement ; and that the sole right to the use of a thing was the same as a right to the thing itself. Such is the present case ; it is a demise of a dairy ; of the sole right of the enjoyment of certain closes to the exclusion even of the lessor himself. For as to the circumstance of the bull, that does not derogate from the general and exclusive right granted ; on the contrary the stipulation was inserted for the benefit of the lessee, and not of the lessor, since otherwise the lessee could not have had the advantage of the cows.

BULLER, J. :

This action † of trespass under the circumstances of the case is now for the first time brought before the Court. In the argument in *R. v. Tolpuddle* it was contended that trespass could not be maintained by the lessee of such an interest as this : but I was of a different opinion, and still continue to think so. On these agreements the remedy has usually been, as was observed at the bar, on the covenant : but it does not follow that, because the lessee may maintain an action of *covenant, where there is a covenant in the deed, he cannot also maintain trespass. There are various instances in which a party has one of two remedies at his election. This case has been argued on the part of the plaintiff, as if the substantial part of the grant was of the milk of the cows only : but that is not the whole of the agreement. It is immaterial whether the cows or the land be first mentioned, if they be both let ; and the substance of the agreement is, that the defendant should have the sole and exclusive use and enjoy-

[*334]

* Vide *Wilson v. Mackreth*, 3 Burr. 1924.

ment of this land, together with a certain number of cows and a bull for the use of those cows to be fed on this ground. Then it is the same with respect to the interest which the defendant took in the land as if he had rented the cows from some other person. The defendant's object was to have the sole occupation of the land, to be enjoyed in a particular way. And this I think supports his plea, in which he says he is entitled to the separate herbage and feeding of these closes. Whether the number of cattle to be depastured on these closes were or were not limited by the lessor, it is immaterial; for if no cattle but the lessee's were to be turned on, he was entitled to the exclusive right of feeding there; and this proves the plea in the terms in which it is pleaded. And this is the only question that can arise in this stage of the cause. For even if there were any foundation for the other objection, that the defendant having the separate pasture could not distrain, which seemed indeed to be abandoned, that would not so properly arise now as on a motion in arrest of judgment, on the ground that the conclusion drawn from his interest does not follow in point of law. But I think that there is no foundation for such an objection; for if the defendant has the sole and exclusive right to the occupation of these closes, he may maintain trespass against any person who infringes that right, or he may distrain cattle doing damage there.

1793.
BURY
v.
MOORE.

GROSE, J.:

This question arises on the defendant's plea, which states that he is possessed of the separate herbage and feeding of certain closes. In order to see whether this plea be proved, it is necessary to resort to the agreement; and that I have no difficulty in saying gives to the defendant the use of a certain number of cattle, and the separate herbage and feeding of the closes there mentioned for the use of those cattle. It seems to me that according to the express words of the agreement and the intention of both parties *the defendant was to have the separate herbage and feeding of the closes in question; and consequently that the plea is proved. The other question alluded to is a question of law; and I agree with my brother BULLER in what he has said relative to the time of making the objection. But even

[*335]

1793.
BURT
v.
MOORE.

if the objection could now be gone into, I think there is no weight in it; for it must be governed by a case in 1 Rol. Abr. 405, 406, where it is said, that if by a custom the lord has no right to turn cattle on the common at a certain season of the year, and J. S. has a right of common there during that season, the latter may distrain the cattle of the former turned out at that time.

Gibbs then cited Co. Lit. 4, b, where it is said that if one hath *vesturam terræ*, or *herbagium terræ*, he may maintain trespass *quare clausum fregit*.

Per CURIAM :

Postea to the defendant.

1793.
June 11.

DENN, ON THE DEMISE OF JOHN SLATER, v. JOSEPH SLATER.

[335]

(5 T. R. 335—338.)

A. devised to his nephew B., but if he died without male heir, then to another nephew C. and his heirs; and charged the estate with an annuity to D. and several legacies to other persons, to be paid at a future time; held that B. took an estate tail.

In ejectment for a copyhold estate at Hazlewood, within the manor of Duffield, in the county of Derby, tried at the last assizes, before Thomson, B. a verdict was taken for the plaintiff, subject to the opinion of this Court on a special case. John Slater, by will dated 24th May, 1742, having before duly surrendered to the use of his will, devised as follows: "As touching the disposition of all such temporal and worldly estate as it hath pleased God to bestow upon me, I dispose thereof as followeth [after directing the payment of his debts, &c.] Also I give and bequeath all my copyhold lands, lying in Hazlewood, to my nephew Isaac Slater; but if the aforesaid Isaac Slater should die without male heir, then my will is that my nephew John Slater shall enter upon and enjoy the said copyhold lands, his heirs or assigns for ever; provided the aforesaid Isaac Slater pay to my now wife Elisabeth Slater the sum of 8*l.* every year during the term of her natural life, by two equal payments, &c. And if my

said nephew Isaac Slater shall refuse or neglect to pay the aforesaid sum of 8*l.* yearly, that my now wife shall enter upon and enjoy the said copyhold lands during her natural life.

1793.
DENN
v.
SLATER.

[Here follow other bequests.] Also my will is, that my nephew Isaac Slater shall pay unto J. B. and E. B. 20*l.* each, within four years after *my wife's decease, out of the copyhold lands in Hazlewood; but if either or both of the said J. B. and E. B. shall happen to die before the time before mentioned, then my said nephew Isaac Slater shall pay that share or shares to A. the wife of N. B. her heirs, &c.; also my nephew Isaac Slater shall pay to my nephew D. S. 15*l.* out of the copyhold lands in Hazlewood ten years after my decease. In August, 1771, Isaac Slater was admitted on the death of the deviser, and afterwards surrendered the premises to the use of himself for life, remainder to the defendant his younger son in fee. Isaac Slater is now dead, leaving the lessor of the plaintiff his eldest son and heir at law. On the 3rd January, 1793, the lessor of the plaintiff was admitted. By the custom of the manor of Duffield a recovery is necessary to bar an estate tail, and no recovery was had by Isaac Slater of the premises in question. Isaac Slater paid the annuity to the testator's widow during her life, and the legacies therein mentioned.

[*336]

Sutton for the plaintiff [was stopped in his argument by the Court].

Clarke, contrà: * * *

LORD KENYON, Ch. J. :

[337]

It is clear from all the cases on this subject, that Isaac Slater took an estate-tail. In *Blaxton v. Stone*,† where the father devised to his eldest son, “and if he died without heirs male, then to his other son,” the Court thought that though it was evident that the word “body,” which properly creates an estate-tail, was omitted, the intent of the deviser might be collected out of his will, that he designed an estate-tail; and they adjudged it to be so. And in 1 Vent. 290, Lord HALE mentioned *Burley's* case, 43 Eliz.; “A devise to A. for life, remainder to the next heir male,

† 3 Mod. 123.

1793.
DENN
v.
SLATER.

[*338]

for default of such heir male then to remain; adjudged an estate-tail." And with regard to the other question, the law on this subject is very accurately stated by Lord MANSFIELD in the case in Cowper.† Where an estate is given generally without adding words which would create a fee or an estate-tail, and it is charged with the payment of annuities, the devisee takes a fee: but that is not *the case where an estate-tail is given to the devisee. In this case, the devisor's wife, to whom the annuity was given, had a power of entry in case of non-payment of her annuity. And the legacies given were to be paid at a remote period, before which time the devisee had the power of acquiring the fee by suffering a recovery. We should be removing the land-marks of real property, if we were to determine that Isaac Slater took an estate in fee.

ASHHURST, J. of the same opinion.

BULLER, J. :

The words "heirs male" may admit of three different constructions. First, if the King by patent grant to a man and his heirs male, the latter words convey no interest. Secondly, if an individual by deed grant to A. and his heirs male, A. takes a fee; because, against the grantor the word "male" is rejected. Thirdly, but in the case of a devise in those words, the devisee takes an estate-tail, because the Court may supply the words "of the body," if they be wanted to effectuate the devisor's intent.

LORD KENYON :

A fourth case may be put where a different meaning may be given to those words; if an estate of freehold be limited to A., remainder to his heirs male, the latter words enlarge A.'s estate to a fee: but it is otherwise, where only a term of years is given to A., remainder to his heirs male; in such case the latter words are words of purchase.

Per CURIAM :

Postea to the Plaintiff.

† *Doe v. Fyldes*, Cowp. 833.

THE KING *v.* JANE HORSLEY.

(5 T. R. 362.)

1793.
June 18.

[362] .

When a defendant is brought up on an attachment for a rescue it is the practice of the Court to put interrogatories to him, though he do not deny the charge in the affidavits, unless the prosecutor waive putting them.

THE defendant being brought up on an attachment for rescuing a person arrested on a warrant for obstructing excise officers,

Erskine objected to interrogatories being put to her, as she did not deny the facts charged on her by the affidavits.

Bearcroft and *Litchfield*, for the Crown, said that it was the practice of the Court to compel a person in the defendant's situation to answer interrogatories.

Lord KENYON, Ch. J. said, he remembered this point very strenuously resisted by *Dunning* when he was at the bar, and that he was answered, that it was the invariable practice to put the defendant to answer interrogatories.

But the prosecutor afterwards waiving putting interrogatories to this defendant, the Court passed judgment on her.*

K. B. MICHAELMAS TERM.

POWLEY *v.* WALKER.

(5 T. R. 373.)

1793.
Nov. 9.

[373]

The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in an husband-like manner.

THE first count in this declaration alleged that on such a day "the defendant became and was tenant to the plaintiff" of a certain farm, &c. in consideration whereof he undertook and promised not to carry away from the farm any of the straw, dung,

* See now Crown Office Rules, 1886, rule 264.

1793.
POWLEY
v.
WALKER.

compost, &c. The second stated that for the same consideration the defendant undertook and promised to cultivate the land in a good and husband-like manner, according to the custom of the country ; and the third to manage and cultivate the land according to the usage and course of good husbandry. After verdict for the plaintiff,

Chambre moved to arrest the judgment, on the ground that there was no consideration for the promises ; observing, that it was not alleged that the defendant had become tenant to the plaintiff on the terms that he would cultivate the land in a good and husband-like manner, &c. but merely “ that he became and was tenant to the plaintiff.” But

The COURT said, that the bare relation of landlord and tenant was a sufficient consideration for the promises in the declaration ; and therefore they

Refused the rule.

1793.
Nov. 18.
[389]

HYDE AND ANOTHER v. THE NAVIGATION COMPANY FROM THE TRENT TO THE MERSEY.

(5 T. R. 389—400.)

Common carriers from A. to B. charge and receive for cartage of goods to the consignee's house at B. from a warehouse there, where they usually unloaded, but which did not belong to them ; they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allow all the profits of the cartage to another person, and that circumstance were known to the consignee.*

THIS was an action on the case against the defendants as common carriers. The declaration stated that the defendants were common carriers of goods for hire from Gainsborough, in the county of Lincoln, to Manchester, in the county of Lancaster. That the plaintiffs on the 28th September, 1789, delivered to the defendants eighteen bags of cotton, to be safely carried by the defendants from Gainsborough to Manchester, and there to be

* *Garside v. same Defendants*, p. 468, *ante* ; *Rowe v. Pickford*, 8 Taunt. 83.

delivered to the plaintiffs, &c., and that the defendants undertook to carry and convey, &c., and there deliver them, which they neglected, &c. The second count was upon a delivery of fourteen other bags of cotton, to be carried by the defendants from Bromley Common, in the county of Stafford, to Manchester, and there to be delivered to the plaintiffs; that the defendants undertook, &c., and that the goods were lost through their negligence.

1793.
HYDE
v.
The TRENT
and MERSEY
NAVIGATION
COMPANY.

It appeared at the trial that the goods were put on board the defendants' barges at the respective places mentioned in the declaration, and conveyed therein along the defendants' navigation and the Duke of Bridgewater's canal to Manchester, where they were landed upon the quay, and lodged there in the Duke of Bridgewater's warehouse, in which place they were consumed by an accidental fire the same night. In the bills made out by the defendants, there were charges of so much for tonnage on the river Trent, so much for tonnage on the Trent and Mersey Navigation, so much for the Duke of Bridgewater's canal, so much for warehouse-room for the Duke of Bridgewater; besides which, in the bill for the fourteen bags, was a charge for cartage, which was intended for the cartage from the Duke of Bridgewater's warehouse to the plaintiff's own warehouse in Manchester, and which was paid by the plaintiffs when the goods were put on board the defendants' barges: but the charge for warehouse-room was merely received by the defendants as agents to the *Duke, and they had no share of the profit. It appeared also to be the practice of many persons in Manchester, for whom goods were brought by the defendants, to send their own carts for the goods from the quay or warehouse, but the usage had uniformly been for the cotton merchants to have their goods conveyed to their own warehouse in carts furnished by the defendants. Formerly the defendants employed their own carts for this purpose, but had latterly given up this business, together with the profits derived from it, to a person of the name of Hibbert, who was their book-keeper; and the plaintiffs knew that the cartage had been received for this man. Previous to this transaction the defendants had circulated the following printed notice: Navigation from the Trent to the Mersey. Conveyance of goods by

[*390]

1793.
 HYDE
 v.
 The TRENT
 and MERSEY
 NAVIGATION
 COMPANY.

land and navigation to and from London, Manchester, Warrington, Liverpool, Chester, most parts of the North, the Staffordshire Potteries, and their environs. The proprietors having hitherto laboured under several inconveniences to make this conveyance worthy the attention of merchants, &c. have at length removed every obstacle, and can now promise to deliver goods each way in ten days with the utmost punctuality, and at a much reduced price to an inland conveyance," &c. Since this transaction, upon the arrival of goods, &c. at the quay at Manchester, the defendants have sent written notices of the same to the owners, desiring them to order the goods away as soon as possible, as they remained at the risk of the owners. A verdict was found for the plaintiffs at the sittings after last term at Guildhall, before Lord Kenyon; to set aside which a rule having been obtained,!

Erskine, Garrow, and Wood, now shewed cause against that rule. They argued that:—1st, The defendants are answerable for this loss by their general liability, as common carriers: 2ndly, By their special undertaking in this case. * * *

Bearcroft and Lane, contra:

[393] [They argued that]—1st, A carrier's general liability ceases as soon as he is arrived at the place of his destination, and the goods are delivered into another's custody. * * * The case of *Garside* against the present defendants is strictly in point; for immediately upon the arrival of the goods at Manchester, where they were afterwards consumed before they could be forwarded to the ultimate place of their destination, it was held that the defendants were discharged of their liability as carriers. That was even a stronger case than the present, because there the defendants undertook to forward the goods from Manchester to Stockport: and it might as well have been contended there that the defendants were bound to deliver them to the Stockport carrier, as in this case to the owners themselves; for the Stockport carrier was for that purpose an agent of the owner. 2ndly, As to the particular undertaking of the defendants: it was proved that the plaintiffs knew that the

cartage was received for Hibbert, and not for the defendants, and therefore that circumstance cannot be brought forward to charge them. * * *

LORD KENTON, Ch. J. :

This is a question of very general concern ; since few days in the year occur in which cases do not arise that may depend upon it ; and therefore it were to be wished that this case should have called for a decision upon the point, which should have left no doubt in future respecting the extent to which common carriers are liable. But peculiar circumstances exist in this case, which render it unnecessary to decide the general question ; though, as the whole has been argued at the bar, I will give my opinion on the general, as well as the particular, question made. I lay no stress on the circumstance so much relied on, that the defendants named themselves on their card, “ carriers by land and navigation ” : that was introduced in order to advertise the public that they would carry the whole distance from London to the most extreme point, including, in several places, intervals by land between one navigable cut and another : this, therefore, could have no reference to the article of cartage from the navigation at Manchester to the plaintiffs’ warehouse. On the point of law, the rule is too clear to admit of any doubt : the only question is respecting the application of the facts in this case to it, Whether at the time when the accident happened the goods were in the custody of the defendants as common carriers ? because, if they were, by the strict rules of law the defendants are responsible, carriers being insurers in all cases except in two. That the plaintiffs’ goods were in the custody of the defendants as carriers, when they were navigated on their own canal, there is no doubt ; it is equally clear that they were so during the time when they were on the Duke of Bridgewater’s canal, which is open to the public, they paying the Duke tonnage on it ; it is as clear that when the goods arrived at Manchester, they were unloaded with due care and circumspection, and deposited in the Duke of Bridgewater’s warehouse ; after this a further act was to be done, the goods were to have been taken away in carts, but not by the defendants, for, though they formerly kept carts and

1793.

HYDE

v.

The TRENT
and MERSEY
NAVIGATION
COMPANY.

[394]

1793.
 —
 HYDE
 v.
 The TRENT
 and MERSEY
 NAVIGATION
 COMPANY.

[*395]

carried away the goods of their customers to their respective houses, for some time past they had ceased to have any concern with the carts, or to derive any advantage from cartage whatever; the carts themselves and all the benefit arising from that part of the business belonging to Hibbert. If indeed there had been any fraud in this transaction, as if the defendants had induced the public to believe that they would be responsible in all cases, and, in order to excuse themselves, had relied on some secret agreement between them and Hibbert, that might have varied the case; but in the first place we cannot presume fraud, and in the next, there are no facts in this case from which we could presume it. If the defendants here be liable, consider how far the liability of carriers will be extended: it will affect the owners of ships bringing goods from foreign countries to merchants in London; are they bound to carry the goods to the warehouses of the merchants here, or will they not have discharged their duty on landing them at the wharf to which they generally come? It would be strange, indeed, if the owners of a West Indiaman were held liable for any accident that happened to goods brought by them to England, after having landed them at their usual wharf. The instance of game, which has been mentioned at the bar, shews the general sense and understanding of the public on this subject. The different claims of the respective persons concerned are separately marked on the direction. The carrier who receives a certain sum for carrying the game, is not bound, in consideration of that sum, to deliver the goods; he has performed his duty when he has brought the game to the inn where he puts up; then the business of the porter begins. I am not aware that it has ever been decided that it is the duty of the carrier to deliver such goods at the house of every individual person to whom they are directed: if it has, the action brought by Mr. Price against the keeper of the Bell Inn was misconceived; it should have been brought against the carrier, and not the innkeeper; and yet it did not occur to the defendant's counsel, in that case, to make such an objection. When goods are sent by a coach, a letter of advice should also be sent to the person to whom they are directed that he may send for them: or the price which the

porter expects to receive for delivering them will induce such porter to carry them: but the carriage and portorage constitute distinct charges.

In this case, however, there is one peculiar circumstance, which makes it unnecessary to decide the general question, and that is the charge made by the defendants in one of their bills for the cartage at Manchester; for that charge the defendants undertook to deliver the goods. Therefore, without deciding the general question, I think that the plaintiffs are entitled to the verdict which they have obtained. On the general point, I have great doubts; the leaning of my mind at present is, that carriers are not liable to the extent contended for.

1793.

HYDE

v.

The TRENT
and MERSEY
NAVIGATION
COMPANY.

ASHHURST, J.:

[396]

I am glad to find one circumstance which puts the case out of all doubt, namely, that one of the bills contains a charge for wharfage and cartage; which is decisive to shew that in this case the liability of the defendants continued until the goods were delivered. Had it not been for this circumstance, I should have desired further time to consider the case. The inclination of my opinion on the general question is that a carrier is bound to deliver the goods to the person to whom they are directed. A contrary decision would be highly inconvenient, and would open a door to fraud: for if the liability of the carrier were to cease when he had brought the goods to any inn where he might choose to put up his coach, and a parcel containing plate or jewels, brought by him, were lost before it was delivered to the owner, the latter would only have a remedy against a common porter. It has been said, however, that it is the practice of many persons to send to the inn for their goods; but that does not prove that the carrier is not bound to deliver them, if they do not send. If the owner choose to send for his goods, that merely discharges the carrier from his liability in that case; it only dispenses with the general obligation thrown by the law upon the carrier; but it does not apply to other cases where that obligation is not dispensed with. But on this question I do not mean to give any decided opinion.

1793.

BULLER, J. :

HYDE

v.

The TRENT
and MERSEY
NAVIGATION
COMPANY.

Upon the general question my opinion coincides with that given by my brother ASHHURST; and according to the defendants' own argument great inconveniences would result to the public from adopting any other rule. According to their argument, there must be two contracts in all cases where goods are sent by a coach or a waggon; but I think the same argument tends to establish the necessity of three; one with the carrier, another with the innkeeper, and a third with the porter. But in fact there is but one contract; there is nothing like any contract or even communication between any other person than the owner of the goods and the carrier; the carrier is bound to deliver the goods, and the person who actually delivers them acts as the servant of the carrier. This does not militate against the decision in the action alluded to against the innkeeper. In general it happens that the innkeeper in London has some interest or concern in the coaches and waggons that put up at his house; in those cases he is liable as carrier; but even if this fact were not proved in that case, the porter was considered as the servant of the innkeeper; and if the latter insisted, by his servant, that *he would not part with the game until he had received more than he was entitled to, he was a wrong-doer, and liable to an action of trover. It has been said too, that the place of a porter is valuable, and is the subject of a purchase: but who sells the place? Who agrees with him that he shall pay the porter? Not the person to whom the goods are sent, but the carrier and the innkeeper, whom I consider as the same person. But if the innkeeper have no share in the profits of the carriage, and receive the goods for the purpose of delivering them to the owners, then the innkeeper is the servant of the carrier as well as the porter. Therefore, whether there be the innkeeper and the porter, or the porter only, the carrier is liable in all cases where the goods are lost after they get into the hands of the innkeeper or porter, because they are delivered to those persons with the consent, and as the servants, of the carrier. It does not appear to me that the difficulties suggested respecting foreign ships exist. When goods are brought here from foreign countries, they are brought under a bill of lading, which is

[*397]

merely an undertaking to carry from port to port. A ship trading from one port to another has not the means of carrying the goods on land; and, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier.

1793.
HYDE
v.
The TRENT
and MERSEY
NAVIGATION
COMPANY.

In this case, however, I have not the least doubt. The expression in the card, circulated by the defendants, "carriers by land and navigation," cannot indeed have much weight for the reasons given: but I rely on the charge which the defendants compelled the plaintiffs to pay before they would engage to deliver the goods. Hibbert was originally a servant to the defendants; and though he has since, by agreement with them, undertaken the cartage on his own account, and received the whole profits of it himself, that cannot affect third persons. The different proprietors may divide the profits among themselves in any way they choose, but they cannot by their own agreement with each other exonerate themselves from their liability to the owner of the goods. The carriers have the direction of the goods, and are responsible for them until they are delivered to the owner; and here the defendants insisted on receiving a certain sum of money for the whole expense of carrying and delivering, including the identical charge of cartage, before they would take the goods into their vessel. If the carrier and porter were to make separate contracts with the owner of the goods, the latter would at least have the option of sending his own carts to bring away his goods; *whereas here the defendants put the goods into the Duke of Bridgewater's warehouse at once, in order to send them afterwards to the plaintiffs by a particular cart of their own. The defendants say, however, that they are warehousemen as well as carriers. That they may fill those two different characters at different times I am ready to admit; but I deny that they can be both warehousemen and carriers at the same instant. In this case they received the goods in the capacity of carriers; and, as the engagement was to carry and deliver them, the goods remained in their custody as carriers the whole time. The case of *Garside* against these defendants is perfectly distinguishable from the present: there the engagement on the part of the defendants was merely to carry the goods to Manchester; and having dis-

[*398]

1793.

HYDE

v.

The TRENT
and MERSEY
NAVIGATION
COMPANY.

charged their duty in carrying them to that place, their liability ceased. It was proved in that case, that if the defendants had had the means of forwarding the goods from Manchester to Stockport, they were ready to have delivered them to the Stockport carrier ; but no such carrier being then arrived, what were the defendants to do ? They had carried the goods to the place of delivery according to their contract, and there being no one there ready to receive them, the 'next thing to be done was to deposit them in a place of safe custody, and then their contract was at an end. But in this case the contract was not only to carry, but to deliver the goods at Manchester ; and the plaintiffs had not the option of taking them from the quay before they were put into the warehouse by the side of the canal. The preference given by the defendants to Hibbert, respecting the cartage, is also a material circumstance ; it is like the case of an innkeeper, who agrees with his head ostler, that the latter shall supply the customers with post-horses ; in which case, if goods be lost, the innkeeper is liable, because he holds himself out to the public as the responsible person, and his engagement with his servant cannot vary the contract between him and the public. So, in this case, Hibbert was the servant of the defendants, and the goods were still in the custody of the defendants as carriers, at the time when the fire happened.

GROSE, J. :

The question in this cause is, Whether the plaintiffs' goods, when they were consumed by the fire, were or were not in the custody of the defendants as common carriers ? Undoubtedly they were so, unless the defendants had, according to their undertaking, delivered them to the plaintiffs. And then arises the material question, Whether the delivery of the goods *at the warehouse at Manchester were a delivery to the plaintiffs. It seems to me that upon the circumstances of this case it cannot be considered to be a delivery to them. Whether it be or be not a delivery, may depend on the general custom of the trade, or the particular usage which has prevailed between the parties themselves. As to the general custom, it is a strong circumstance against the defendants that the cotton merchants have never

[*399]

been accustomed to send their own carts for their goods, but those goods have been sent to their respective owners either by carts belonging to, or procured by, the defendants. And in the present case the particular transaction is decisive against the defendants; for the cartage was demanded of, and paid by the plaintiffs, before the goods were put on board the defendants' vessel; and from that circumstance the defendants undertook to deliver the goods at the place to which the carts were to carry them. They did not deliver them at that place: the delivery at the warehouse was not a delivery to the plaintiffs according to this contract. So much for the circumstances of this case, which leave no room for doubt. On the general question of law I am not so perfectly clear; and if it had been necessary to have decided this case on the general law, I should have desired further time to consider of it. As far, however, as I have considered this case, the strong inclination of my opinion is, that the defendants would be liable as common carriers. The law, which makes carriers answerable as insurers, is indeed a hard law: but it is founded on wisdom, and was established to prevent fraud. But it seems to me, that it would be of little importance to determine that carriers were liable as insurers, unless they were also bound to see that the goods were carried home to their place of destination; since as many frauds may be practised in the delivery as in the carriage of them. In general the carrier appoints a porter who provides a cart for the purpose of delivering the goods: but it would be open to an infinity of frauds, if the carrier could discharge himself of his responsibility by delivering them to a common porter, a person of no substance, a beggar of whose name the owner of the goods never heard, and against whom, in the event of the goods being lost, there could be no substantial remedy. In this case the carriers fixed on the particular warehouse at which the goods were deposited on their arrival at Manchester, and made an agreement with their own servant Hibbert, respecting the cartage. The defendants, therefore, ought to be answerable for the acts of those persons whom they nominate. With respect to the case of **Garside* against this company; there the goods were delivered, at least as far as the defendants were bound to deliver them. The case of foreign goods brought to this country

1793.

HYDE

v.
The TRENT
and MERSEY
NAVIGATION
COMPANY.

1793.

HYDE

vs.
The TRENT
and MERSEY
NAVIGATION
COMPANY.

depends on the custom of the trade, of which the persons engaged in it are supposed to be cognizant: by the general custom the liability of ship carriers is at an end when the goods are landed at the usual wharf. On the particular circumstances of this case I am clearly of opinion that the verdict is right. And on the general question of law, I do not mean to be bound by the opinion I have now given, though at present I think that common carriers are answerable if the goods be lost at any time before they are delivered to the owners.

Rule discharged.

1793.

Nov. 20.

[402]

SMITH AND ANOTHER v. FIELD.

(5 T. R. 402—405.)

A contract of sale may be rescinded by the consent of the vendor and vendee before the rights of other persons are concerned. But where the vendee wished to return the goods, and the vendor instituted an attachment to attach the goods in the hands of a packer as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt, it was held that the vendor could not recover the goods from the packer in trover.

On the trial this action of trover for several pieces of calico, at the sittings at Guildhall after last Trinity Term, the question was, Whether the goods were the property of the plaintiffs, or formed a part of the effects of J. Dewhurst a bankrupt, and as such vested in his assignees? and the following case was reserved for the opinion of this Court:

[403]

J. Dewhurst had one house of trade in Austin Friars, London, where his business was conducted by J. L. Hill, his clerk, and another house of trade at New York, where he himself resided, and conducted his business. Both in London and at New York his business was carried on under the firm of J. Dewhurst and Co.; but he had no partner. The goods for which this action was brought were sold by the plaintiffs to J. Dewhurst through the intervention of J. Hill, as his clerk, on the 3d and 5th of May, 1792, and were delivered on those days at the house in Austin Friars, London, and were afterwards sent by Dewhurst's

clerk to the defendant, to be packed, in order that they might be shipped to Dewhurst at New York. On the 9th of April, 1792, Dewhurst wrote a letter to Hill, his clerk and manager, which was received by Hill in London on the 18th of May, 1792; in which, after saying that he was ruined in consequence of several failures, he added, "If you have purchased any goods for my account, or if any orders are given, let the persons have their goods back, and countermand all orders." Scott, one of the plaintiffs, knew of the contents of this letter on the 18th of May, 1792; but he had no idea that Hill could deliver him the goods back. On the 19th of May, 1792, the plaintiff Scott made an affidavit in the Sheriffs Court, London, of a debt of 2,500*l.* due from Dewhurst to the plaintiffs, as for goods sold and delivered. Upon this affidavit an attachment was issued out of the Sheriff's Court on the 19th of May, 1792, and served upon the defendant Field, in order to attach the goods in question, and all the other goods belonging to Dewhurst in the hands of the defendant; but the attachment has not been proceeded in. Upon the action in the Sheriff's Court the plaintiffs also attached all the goods of Dewhurst in the hands of Hill, and proceeded to a judgment of appraisement in the last-mentioned attachment, and which now remains in force; but from which the plaintiffs have derived no benefit; the proceedings on such attachment having been stayed by injunction of the Court of Chancery. The goods in question constituted part of the debt sworn to in the affidavit. On the 18th and 19th of May, 1792, several other attachments were made in the Mayor's Court and Sheriff's Court, London, and served upon the defendant by Dewhurst's creditors, in order to attach the goods in question and other goods which had been so sold to Dewhurst, and sent to the defendant as his packer; and the debt for which such attachments were made exceeded in amount the value of all the goods in the hands of the defendant. On the *21st of May, 1792, a meeting of Dewhurst's creditors was convened by Hill, his clerk, when the letter was laid before them. On the 23rd of May, 1792, the plaintiffs demanded the goods in question of the defendant; and in consequence of their not being delivered, commenced the present action. Dewhurst returned to England in October, 1792, and assignees of his effects

1793.

SMITH
v.
FIELD.

[*404]

1793.
SMITH
v.
FIELD.

were chosen under a commission of bankrupt, dated the 19th of January, 1798.

Baldwin, for the plaintiffs, relied on the case of *Salte v. Field*,† as deciding the present; observing that the only difference between that case and this consisted in the declaration made by one of these plaintiffs after the delivery of the goods at Dewhurst's house, that he had no idea that Dewhurst's clerk could deliver him the goods back again, and the circumstance of the plaintiffs' having attached the goods in the hands of Hill. But (he contended) that the ignorance of that one plaintiff could not vary the law of the case against them; it was merely a declaration by him as to his conception of the law, and not of the contract between the parties: and, as to the attachment, that proceeding was instituted merely for the purpose of obtaining possession of the goods by a more speedy remedy than by an action of trover.

LORD KENYON, Ch. J. (stopping *Erskine, contra*):

When Dewhurst, the bankrupt, discovered his real situation, he acted as became an honest man: and it were to be wished that that, which he intended to do, could now be complied with; but the interests of other persons intervene, the general mass of his creditors. The goods were delivered to Hill, as the agent of Dewhurst, and treated by Hill as Dewhurst's property. In the former case, of *Salte v. Field*, the Court went as far as they could to assist the seller, but there both the buyer and seller agreed to rescind the contract before the bankruptcy. That case, therefore, as well as that of *Atkin v. Barwick*,‡ proceeded on the ground of a renunciation of the contract by all the parties concerned. But in this case that circumstance, which differs it from the others, is wanting. On the 18th of May Dewhurst's letter was communicated to the plaintiffs, and his situation explained to them, but they declined rescinding the contract of sale, not indeed in words, but by an act incapable of being explained away; for on the next day they instituted a proceeding in the Sheriff's Court *by attachment, in which they made an

[*405]

† *Ante*, p. 568.

‡ 1 Str. 163.

affidavit that Dewhurst was indebted to them for these goods, and they attached the goods as the property of the bankrupt. When the offer was made to them by Dewhurst, they might have rescinded the contract, but they declined doing it, and they treated it as a subsisting contract. They cannot therefore now insist that it was rescinded.

1793.

SMITH
v.
FIELD.

ASHHURST, J. :

Though a contract may be rescinded by both the contracting parties, it is not in the power of one alone to do it. Here the vendee was desirous of rescinding the contract, but the vendors, whether by mistake of the law, or for what other reason, it is not necessary to enquire, would not consent, but on the contrary affirmed the contract, and considered the goods as the property of the bankrupt. And in that circumstance consists the difference between the case of *Salte v. Field* and the present.

BULLER, J. :

The case of *Salte v. Field* proceeded on a very clear principle. There the contract was rescinded by both parties, while they had it in their power : but here, though Dewhurst offered to restore the goods, the plaintiffs objected to the proposal. The plaintiffs were informed of Dewhurst's situation, and of his offer ; no fact was concealed from them ; their act was founded on an ignorance of the law, but that will not assist them. The instant they made an affidavit that Dewhurst was indebted to them for these goods, it operated like a positive declaration by them that they did not rescind the contract.

GROSE, J. :

The true difference between this and the former case, is that which has been stated, namely, that there both the parties agreed to renounce the contract, whereas here the vendors refused to do so.

Postea to the defendant.

1793.
Nov. 23.

[427]

DOE, ON THE DEMISE OF JOHN WATTS, v. ROBERT
WAINEWRIGHT.

(5 T. R. 427—431.)

The limitations in a deed were to trustees to the use of A. and B. for their lives, remainder to the use of the child or children of B. in tail as tenants in common; "and in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be and remain to the use of the surviving child or children of B. and the heirs of his, her, or their bodies issuing, and in case all the said children should die without issue," &c., then to A. in fee; held that the deed created cross remainders between the children of B.; and that on the death of one without issue, his share vested in a surviving child and the heir of one deceased, as tenants in common.†

On the trial of this ejectment for a sixth part of the manor of Grafton, and other lands, in Oxfordshire, a special case was reserved for the opinion of this Court.

By indentures of lease and release bearing date the 30th and 31st of July, 1718, the release being of three parts, and made between Mary Marner, widow, and Richard Abell and Elizabeth his wife, of the first part; Mary Abell and Robert Abell, son and daughter of Richard and Elizabeth Abell, of the second part; and W. Billers and E. Edwards, of the third part; Mary Marner and Richard Abell, in consideration of love and affection granted and released unto Billers and Edwards, and to their heirs, the manor or lordship of Grafton, and divers lands, &c. (in the release particularly described,) in the county of Oxford, to hold unto Billers and Edwards, and their heirs, to the following uses, viz. as to one *moiety to the use of Mary Marner for life, and as to the other moiety, as also to the moiety limited to Mary Marner for her life; from and after her decease to the use of Richard Abell and Elizabeth his wife, for their lives, and the life of the longest liver of them; and from and after the decease of the survivor of them to the use of Mary Abell for her life; and from and after her decease to the use of such child or children as Mary Abell should thereafter have, as tenants in common, (if more than one,) and the heirs of their several bodies issuing: "And in case any such child or children should die without

[*428]

† See *Williams v. James* (1872) 7 Ch. D. 255, 269, 20 W. R. 1010, and compare *Lucena* 47 L. J. Ch. 203.

issue of his, her, or their body or bodies issuing, then the part or parts of him, her, or them so dying without issue, should be and remain to the use of the surviving child or children of the said Mary Abell, and the heirs of his, her, or their respective bodies issuing, and so *toties quoties* as any of the said children should die without issue till there should be only one child left ; and in case all the said children should die without issue, or if the said Mary Abell should have no issue of her body, then to the said Robert Abell, his heirs and assigns for ever." Mary Abell married John Wainewright ; and they are both long since dead, leaving issue three children, namely John, Mary, and Robert Wainewright. Mary, the daughter, married Reader Watts, and, having survived him, died several years ago, leaving issue John Watts, the lessor of the plaintiff, her eldest son, and two other children. John Wainewright, the son, died on the 20th of June, 1792, unmarried, and without issue, and without having levied a fine or suffered a recovery of his part of the said manor, &c. leaving his brother (the defendant) Robert Wainewright and the lessor of the plaintiff, his deceased sister's eldest son, surviving him.

1793.
DOE
v.
WAINEWRIGHT.

Williams for the lessor of the plaintiff, after stating the question to be, Whether the share of John Wainewright, who died without issue, vested in his surviving brother Robert the defendant exclusively ? or, Whether in him and the lessor of the plaintiff as tenants in common in tail ? contended for the latter proposition. * * *

Wainewright, contra :

[429]

The Court will not raise cross remainders by implication in this case ; 1st, because the instrument in which it is attempted to be done is a deed ; 2ndly, because there are more than two parties between whom such cross remainders must be raised, if at all ; and 3rdly, there is no apparent intent to raise them upon the face of the deed. * * *

LORD KENYON, Ch. J. :

[430]

This case does not involve any question respecting the raising of limitations by implication, because the deed, on which the

1793.
DOE
v.
WAINEWRIGHT.

[*431]

question arises, contains express limitations by way of cross remainders, not indeed in the formal language used by conveyancers, but in terms sufficiently denoting that it was the intention of the parties to the deed that there should be cross remainders as to some of the children. Therefore all the cases, which were cited by the defendant's counsel to show that cross remainders in a deed cannot be raised *by implication, may fairly be laid out of the case ; because this case, when considered, does not resolve itself into any question of that kind. No technical precise form of words is necessary to create cross remainders ; it is sufficient to say that there shall be cross remainders, though in the verbosity of conveyancers an abundance of words is generally introduced in deeds for this purpose. Here the single question arises on the meaning of the word "surviving," which, indeed, is the only word that distresses the case. But, taking the whole context together, I do not think that that word renders the case doubtful. The fair construction of that word, standing in this context, is that on the death of one child without issue that portion shall go to the surviving line of heirs, and not merely to one child surviving ; it must go to the surviving children in their own persons, if living, or, if dead, to their issues. And in putting this construction I do not think we proceed on conjecture merely ; for the conclusion of this sentence is, "And in case all the said children should die without issue," then the remainder is limited to R. Abell in fee. We cannot give effect to the word "all," without determining that there must be cross remainders, not only as long as the individual children, but as long as the several lines of those children exist. Therefore the share of J. Wainewright, which went over on his death without issue, went to the only surviving child and the heirs of the body of the other child, who was at that time dead, having left issue, as tenants in common. The whole context requires this construction, and the last clause cannot be satisfied with any other.

ASHHURST, J. :

I entirely agree with my Lord that, according to the construction of this deed, the portion of the child dying without issue was to go over, not merely to the surviving children, but to the

surviving children and to the surviving heirs of the children who were dead. This manifestly appears to have been the intention of the parties from the last sentence; for the ultimate limitation is only to take effect on the death of all the children without issue.

1793.
DOE
v.
WAINE-
WEIGHT

BULLER, J. and GROSE, J. declared themselves of the same opinion.

Postea to the plaintiff.

FIRTH v. PURVIS AND OTHERS.

(5 T. R. 432—434.)

1793.
Nov. 22.
[432]

It is no answer to an action on the statute 2 W. & M. c. 5, for a pound breach, that the rent and demand were tendered after the distress and impounding.

THIS was an action for treble damages upon the statute 2 W. & M. c. 5, for a pound breach, tried before the Lord Chief Baron at the last Newcastle assizes.

[It was proved that the plaintiff's tenant, Mossman, being in arrear of rent, the plaintiff had distrained four pipes of beer and had impounded them, and that the defendants who were creditors of Mossman acting under an assignment from him had taken the goods and sold them.]

On the part of the defendants, it was proved, that about an hour after the distress was made, while the plaintiff was yet upon the premises, which were a public-house, one of the defendants said to him, "Come to the bar with me, and I will pay you your rent and your demand," and at the same time he pulled a purse out of his pocket, which he held in his hand; to which the plaintiff answered, "No, I will not have the money, I will have the casks I have seized." Subsequent offers to pay the rent were made to the plaintiff, which he refused, insisting upon the treble damages. The jury found a verdict for the plaintiff to the amount of the rent, added to 20*l.* which was to be trebled under the statute. For setting aside this verdict, a rule *nisi* having been granted,

1793.
FIFTH
v.
PURVIS.
[433]

Law and *Holroyd* were called and argued in support of the rule. * * *

Cockell, Serjeant, and *Lambe*, *contra*, were stopped by

[*434] The Court, who were inclined to think that this was not a good tender, but said that at any rate a tender after the impounding of *the distress made was insufficient; and that under the statute 11 Geo. II. this was an impounding. They thought, however, that the damages were, under all the circumstances of the case, excessive, but on the plaintiff's agreeing to waive the treble, and take single, damages only, the

Rule was discharged.

1793.
Nov. 23.
[449]

THE KING v. JOHN YOUNGER.

(5 T. R. 449—452.)

The statute 29 Car. II. c. 7, does not prohibit a baker baking dinners for his customers on a Sunday.

THIS was a conviction on the statute 29 Car. II. c. 7. The information charged the defendant, who was a baker, with having, on Sunday, 17th of November, 1793, baked meat and pastry for Mr. Paterson, Mr. Harding, and divers other persons, &c. * * *

The judgments were as follows :

[450] LORD KENYON, Ch. J. :

Thirty-four years have nearly passed since the decision of the case of *R. v. Cox*,† which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this Court publicly

† 2 Burr. 787.

declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years. I confess I do not like the complexion of this prosecution; I believe it is a mere collusion between the parties below; and no one can read the evidence which is stated, without considering it in that light. With regard *to the Act of Parliament, on which this conviction is founded, I think we should construe it equitably, so as that it may answer the purposes of public convenience, taking care at the same time that Sunday should not be profaned. It was extremely wise to put a mark on that day; by observing it, Christianity may be kept alive. I agree with Mr. J. Foster,† that I am for an observation of the Sabbath, but not for a Pharisaical observation of it. But must the laborious part of the community, who are entitled to some indulgence for the labours of the past week, fare harder on that than on any other day? They must be fed on that day; many of them have not the means of dressing their dinners at home; and those who have, will, if this defendant be convicted, be prevented observing the Sabbath. That day will (I think) be better observed if the construction put upon this law in *R. v. Cox* be now adopted, than if we over-rule that determination, and adjudge this to be an offence. That decision falls within the reason of the law, and I am glad to find that it is an authority for us at present. The other case cited, *Crepps v. Durden*,‡ is clearly distinguishable from this.

1793.

THE KING
v.
JOHN
YOUNGER.

[*451]

ASHHURST, J.:

It seems to me that the construction put upon this Act in *R. v. Cox* is the right one; the case of bakers, though not particularly mentioned in the exception of the Act, is within the reason of it. Though by this means some few journeymen bakers are kept to work on a Sunday it is for the general convenience of the public, because it enables the rest of the community to attend public worship, which they could not have an opportunity of doing if they had no means of having their dinners dressed from home. As to this conviction in particular, it strikes me in the

† 2 Burr. 786.

‡ Cowp. 640.

1793.
THE KING
v.
JOHN
YOUNGER.

same way it did my Lord; it appears to be a collusive transaction; for the defendant is induced to give evidence against himself, and the witness is stated to have put questions of law to him, apparently for the purpose of negating the exception in the statute that this was a work of charity or necessity.

BULLER, J. :

[*452]

The case of *Crepps v. Durden* does not apply to the present. The baking of bread in the ordinary course of a baker's business is undoubtedly an offence under the Act; and it was too much to suppose that the Court would not in that case determine that baking rolls was not equally so. I argued that case; I barely alluded to the case of *R. v. Cox*, and did not call on the Court to decide this question; there the principal question was whether the plaintiff could be convicted in more than one penalty on the same day. Then this case must *be determined on the words of the statute, and the case of *R. v. Cox*. The words of the Act are vague and indefinite; and if I were now called upon for the first time to expound the different parts of this law, I should be under considerable difficulties in drawing any precise certain line. First, there is an exception as to works of necessity and charity; then there is a proviso that the Act shall not extend to cooks' shops, or victualling houses, for such as otherwise cannot be provided: but these expressions are extremely loose, and no certain line can be drawn, as a pure question of law. We find one solemn determination on these doubtful expressions in the statute; and as that construction has since prevailed, there is no reason why we should now put another construction on the Act, on account of any supposed change of convenience as far as respects the journeymen bakers. If that construction be inconvenient, it is the business of the Legislature, and not of this Court, to remedy it. We, as Judges, are bound to adhere to the former decision.

GROSE, J. :

The question is not whether baking for this or that man be a trade, but whether the trade of baking, carried on in this way, be a work of labour prohibited by the statute. The crime imputed

to the defendant is the having baked dinners on a Sunday. There cannot be any distinction between dressing dinners for the poor and the rich, as far as respects the baker: It is admitted that dinners for the former may be dressed; then is it to be endured that it would be no crime to bake for a man who is too poor to bake at home, and yet that the baker must be convicted on a penal law for baking for another person, who happens to be able to bake at home, a circumstance of which the baker cannot be cognizant? This case therefore seems to me to come within the proviso relative to cooks' shops. But even if the words of the Act were more doubtful, as we find a case which was determined in the year 1759 applicable to the present, and which decision, so far from having been over-ruled, has been acted upon since that time, we ought not to overturn that decision, especially as the case arises upon a penal statute.

1793.
THE KING
v.
JOHN
YOUNGER.

ALCHIN v. WELLS.

(5 T. R. 470—471.)

1793.
Nov. 26.
[470]

If a sheriff levy under a *fi. fa.* he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods.* If after such a compromise either party rule the sheriff to return the writ, the Court will discharge that rule with costs, to be paid by the party obtaining it.

THE plaintiff in this case, having obtained judgment, sued out a *feri facias* and delivered it to the sheriff, who levied on the defendant's goods; and, after being in possession two days, the plaintiff and defendant compromised before the sheriff sold any of the defendant's goods. The sheriff, before he quitted possession, satisfied himself for the poundage on the debt, amounting to 8*l.* Afterwards the plaintiff ruled the sheriff to return the writ; to discharge which rule

Gibbs moved, urging, that as the parties had compromised, neither of them could compel the sheriff to return the writ: and that the attempt in this case had been made with a view to deprive the sheriff of his poundage.

[471]

* Followed by C. A. in *Mortimore v. Cragg* (1878), 3 C. P. D. 216, 47 L. J. C. P. 348.

1793.
ALCHIN
v.
WELLS.

Marryatt shewed cause against the last rule; contending that the sheriff was not entitled to poundage, because he had not had the trouble of selling the defendant's goods, or the risk attending it; and, that the stat. 29 Eliz. c. 4, only allowed poundage on the sum which the sheriff levies or extends and delivers in execution. And that, whether the sheriff were or were not entitled to his poundage, it is no reason why he should not return the writ. But

The Court said, that the sheriff, who had levied under the writ, was unquestionably entitled to his poundage; and that after the compromise neither party should have ruled the sheriff to return the writ. They therefore made the second rule, for discharging the rule upon the sheriff, absolute, with costs.

Rule absolute.

1793.
Nov. 26.
[471]

DOE, ON THE DEMISE OF RIGGE, v. BELL.

(5 T. R. 471—472.)

If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the statute of frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore, the landlord can only put an end to the tenancy at Candlemas.

THIS ejectment was on the demise of T. Rigge, guardian of H. & M. Rigge, infants. At the trial at the last Assizes at York, before the Lord Chief Baron, it appeared that in January, 1790, Wilkinson, as agent for the lessor of the plaintiff, let the farm in question called Hague's farm, to the defendant for seven years, by parol. The defendant was to enter when the former tenant quitted, namely, on the land at old Lady-day, and the house on the 25th of May following; and he was to quit at Candlemas. The defendant entered accordingly, and paid rent. A notice to quit at Lady-day last was served on the 22nd of September, 1792. It was also proved that both the daughters of the lessor of the plaintiff were above 14.

The defendant's counsel objected, first, that the notice to quit was insufficient; the holding being from Candlemas, and the

notice requiring the defendant to quit at Lady-day; 2ndly, That the lessor of the plaintiff claimed as guardian in socage to his daughters, who were both above the age of 14. And the plaintiff was nonsuited.

1793.

DOE

v.

BELL.

Chambre, on a former day obtained a rule, calling on the defendant to shew cause why this nonsuit should not be set aside. As to the first objection, he said, this was holding from Lady-day, and that, therefore, the notice to quit was regular; and as to *the second he produced an affidavit, in which it was stated, that one of the daughters of the lessor of the plaintiff was under 14 years of age.

[*472]

Cockell, Serjeant, and *Walton*, were now to have shewn cause against the rule: but

Law, *Chambre*, and *Barrow*, were desired to answer the first objection; as to which they argued, that as that agreement for seven years was void by the statute of frauds, it being by parol, the defendant must be considered as tenant from year to year, that year commencing at Lady-day when he entered; and that consequently the notice to quit at Lady-day, served more than half a year before, was regular.

LORD KENYON, Ch. J.:

Though the agreement be void by the statute of frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, &c. So where a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms. Now, in this case, it was agreed, that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas.

Rule discharged.

K. B. HILARY TERM.

1794.
Jan. 23.

THE KING *v.* THE BISHOP OF ELY.

(5 T. R. 475—477.)

[475]

If the visitor of a college in one of the universities refuse to exercise his visitatorial power by receiving and hearing an appeal, this Court will grant a mandamus to compel him : but if he has heard and decided on it, this Court has no authority to examine the legality of the judgment. The visitor need not hear parol evidence on such an appeal ; it is sufficient if he receive the grounds of the appeal and the answer to it in writing.

RAINE moved, and was supported by *Gibbs*, for a rule calling on the Bishop of Ely to shew cause why a mandamus should not issue, directed to him, commanding him as visitor of Jesus College, Cambridge, to hear and determine an appeal of the Reverend W. Frend, late a fellow of that college, against a sentence of amotion.

It appeared from the affidavit of Mr. Frend, that in April last he was “removed from his college” by a sentence of the master and fellows, on a charge of having written a seditious pamphlet. That the defendant appealed against this sentence to the bishop of Ely, as visitor, on the grounds that no exceptionable passages in the pamphlet had been produced that no laws of the college, against which the appellant had offended, were pointed out ; that the appellant had no opportunity of vindicating himself ; that there was not a majority of all the fellows of the college concurring in the sentence, as the statutes required ; and, that the punishment was not statutable. That in answer to this appeal the master and five of the fellows asserted to the visitor, that they had examined evidence relating to the publishing of the pamphlet, by which they were *convinced that Mr. Frend was the publisher ; that the appellant had three distinct opportunities given him to defend himself ; and that the sentence, which they had taken upon themselves to inflict, was virtually passed by a majority of the fellows. That to this answer the defendant replied that the evidence was false ; that, with respect to the opportunities offered to him of making a defence, the master and

[*476]

1794.
THE KING
c.
THE BISHOP
OF ELY.

five fellows had misrepresented the case to the visitor, and that three other fellows had protested against the sentence on this ground, that Mr. Frend had not had an opportunity of answering the charge. "That upon the appeal thus made to the visitor, the answer of the master and the five fellows, and the reply of the appellant, the visitor, without reference to any of the statutes of the college, without noticing the allegations of the appellant, or the want of proof on the part of the master and five fellows, without specifying any reasons agreeably to the constant practice of former visitors for his concurrence in the sentence of the master and fellows, in short with a simple declaration That he had duly deliberated upon these things, determined in these words, 'I dismiss the said appeal and affirm the sentence of amotion.'"

The counsel for the rule admitted that this Court had no authority to compel the bishop to exercise his visitatorial power in any particular mode, or to correct his sentence, however erroneous, if that sentence were pronounced after hearing the merits of the case on appeal; *Philips v. Bury*, 2 T. R. 346: but contended, that in this case the bishop had not heard the appeal of Mr. Frend at all; for, that though he received the appeal, he dismissed it without hearing any of the parties. They also mentioned *R. v. The Bishop of Lincoln*, Tr. 25 Geo. III. B. R.; † where the Court said they had a right to compel a visitor by mandamus to hear an appeal, in order that he might form his judgment on the merits of it.

LORD KENYON, Ch. J.:

If there were the most remote probability of raising a question in this case, we ought to grant a rule to shew cause, in order that the question might be further investigated. But as there is no probability of throwing fresh light on this case, and as according to the circumstances now disclosed the rule which applies to cases of this description has been so clearly settled for near a century (since the case of *Philips v. Bury*) that it ought not now to be brought in question again, I think *it would be

[*477]

† 1 R. R. 488 n.

1794.
 THE KING
 v.
 THE BISHOP
 OF ELY.

unjustifiable to put the bishop to the expense of shewing cause against a rule, which is destitute of every foundation on which it can rest. It was settled in *Philips v. Bury*, in which determination the profession has ever since acquiesced, that this Court has no other power than that of putting the visitatorial power in motion, (if I may use the expression,) but that if the judgment of the visitor be ever so erroneous, we cannot interfere in order to correct it. Now here the visitor received the appeal; each party disclosed his case to him; the whole merits of the case were before him; and he has exercised his judgment upon the whole. If therefore we were to interfere, it would be for the purpose of controlling his judgment. But any interference by us to control the judgment of the visitor, would be attended with the most mischievous consequences, since we must then decide on the statutes of the college, of which we are ignorant, and the construction of which has been confided to another forum.

ASHHURST, J. :

When a visitor refuses to receive and hear an appeal, this Court will compel him to exercise his visitatorial power: but we have no authority to compel him to form a particular judgment on the merits. Here the bishop has heard and decided; and I think that the appellant does not state the ground of his application correctly, when he says that the bishop has not heard the appeal.

BULLER, J. :

The whole turns on the equivocal use of the word "heard." The appellant thought he had a right to be heard personally before the visitor, and that the bishop ought not to have decided without hearing parol evidence. But that is not the course of proceeding on these appeals. Here the appellant states that he did appeal; that the college sent their answer to the bishop; and that he (the appellant) replied to it: then the bishop did hear the appeal in the way in which such appeals are usually heard.

GROSE, J. :

If the bishop had not exercised his judgment at all, we would

have compelled him : but it is objected that he has not exercised it rightly ; to this I answer that we have no authority to say how he should have decided.

1794.

THE KING
v.
THE BISHOP
OF ELY.

Rule refused.

CARLOS v. FANCOURT.

IN ERROR.

(5 T. R. 482—487.)

1794.

Jan. 31.

A promissory note, payable on a contingency, cannot be declared on as a promissory note within the statute, 3 & 4 An. c. 9.†

[482]

THIS was an action upon promises, and was brought in the Court of Common Pleas. The first count of the declaration alleged that the defendant (below) in the life-time of A. Fancourt, the late wife of the plaintiff (below), on the 27th of July, 1786, made and signed his certain note in writing, *commonly called a promissory note, and thereby promised to pay to the said A. Fancourt, then being the plaintiff's wife, the sum of 10*l.* "out of his the said defendant's money that should arise from his reversion of 49*l.* when sold," and delivered the said note to the said A. F.; whereby and by reason of which several promises, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note ; and being so liable, the said defendant, in consideration thereof afterwards, &c. promised to pay, &c. yet that he did not, &c. although often requested, &c. and although the said reversion of the said 49*l.* was sold before the suing forth of the original writ, &c. The declaration contained other counts, for work and labour ; money paid, &c. &c.

[*483]

The defendant suffered judgment to go by default ; and a general judgment was entered up on the whole declaration. A writ of error was then brought ; and the plaintiff in error assigned for error, that there was a general judgment on all the counts in the declaration, the first of which was founded on a supposed promissory note, as a note within the statute made concerning

† See now Bills of Exchange Act, 1882, sec. 3. (3).—R. C.

1794.
CARLOS
v.
FANCOURT.

promissory notes, whereas it was not a note within the statute, but a contingent note; and on which, as stated in the declaration, it appeared to be uncertain whether or not the money therein specified would ever become payable, and was therefore void in law; and that it did not appear that the note was given for value received or for any valuable or legal consideration whatever, &c.

[The COURT, after argument, gave judgment as follows:]

[485] LORD KENYON, Ch. J. :

The question in this case is not, Whether the plaintiff in error, who may have promised for a valuable consideration to pay to the defendant a certain sum of money on an event, which has since happened, is or is not bound to perform that promise? If this promise were made on a consideration, there is no doubt but that an action might be maintained on it, as on a special agreement: but the question now before the Court is, Whether or not the note set forth upon the record can be declared on as a negotiable security under the statute 3 & 4 Anne, c. 9? The object of that Act was to put promissory notes on the same footing with bills of exchange in every respect.* It would perplex the commercial transactions of mankind, if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to enquire when these uncertain events would probably be reduced to a certainty. It has been admitted, in the argument, that if this were a bill of exchange the declaration could not be supported: many cases indeed were cited by the counsel on the other side to prove that position, to which may be added another in Lord Raymond,† where it was decided that a bill, which was not payable at all events, could not be considered as a bill of exchange: and this admission by the counsel for the defendant in error is decisive of this case; for there is no difference in this respect between promissory notes and bills of exchange; they both stand *in pari ratione*. If we were to render

* *Vide Brown v. Harraden*, 4 T. R. 148.

† *Vide Jenny v. Herle*, 2 Lord Raymond, 1361.

this point in the least doubtful, we should shake the foundation of that which has been considered as clear law ever since the time of Lord Holt. I am therefore clearly of opinion that this note cannot be declared upon as a negotiable instrument; at the same time I have no doubt but that an action might be framed on it as on a special agreement. The justice of the case is certainly with the defendant in error: but we must not transgress the legal limits of the law, in order to decide according to conscience and equity. We need have no reluctance in reversing the judgment of the Common Pleas, because as this was a judgment by default, that Court had no opportunity of exercising their judgment upon the question.

1794.
CARLOS
v.
FANCOURT.

ASHHURST, J.:

Before the statute of Anne promissory notes were not assignable as choses in action, nor could actions *have been brought on them, because the considerations do not appear on them; and it was to answer the purposes of commerce that those notes were put by the statute on the same footing with bills of exchange. Then they cannot rest on a better footing than bills of exchange, but must stand or fall on the same rules by which bills of exchange are governed. Certainty is a great object in commercial instruments; and unless they carry their own validity on the face of them, they are not negotiable: on that ground bills of exchange, which are only payable on a contingency, are not negotiable, because it does not appear on the face of them whether or not they will ever be paid. The same rule then that governs bills of exchange in this respect must also govern promissory notes. And therefore, though this might have been declared on as a special agreement, stating the consideration for the promise, and the sale of the reversion of 48*l.*, yet this action cannot be maintained. This does not come within the custom of merchants respecting bills of exchange, nor is it a negotiable instrument within the statute of Anne, because as a bill of exchange it would not be good.

[*486]

GROSE, J.:

The plaintiff below could only declare either on this instrument,

1794.
CARLOS
v.
FANCOURT.

as a note under the statute of Anne, or on the special contract that existed between the parties. He has declared on the former : but this is not a negotiable instrument, because it is not payable at all events. It has been said, however, that there is a difference in this respect between promissory notes and bills of exchange : but no decision has been cited to warrant such a distinction ; and without such an authority I think that we ought not to established it ; for the words of the statute of Anne are, “ therefore to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner,” &c. It clearly appears therefore to have been the intention of the Legislature to put promissory notes on the same foundation as bills of exchange. Now if this had been a bill of exchange, the declaration drawn on it as on a bill within the custom of merchants would have been bad, because the money was only to be paid on a contingency. Then if the plaintiff below had declared on this as on a special contract, he should have shewn not only that there was a consideration for the promise, but also that the reversion was sold for at least 10l. ; whereas here it is merely averred that the reversion was sold, without saying for how much. *In whatever way therefore this question is considered, I think the declaration cannot be supported.

[*487]

Judgment reversed.

1794.
Jan. 25.

DAVIS AND OTHERS v. BOWSHER.

(5 T. R. 488—492.)

[488]

A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect. This does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them in order to secure the payment of his general balance.

THIS was an action of assumpsit by the plaintiffs as indorsees of a bill of exchange for 635l. 10s. against the defendant as drawer. The defendant drew the bill in question on one Ames,

payable to Cook, from whom he received no consideration for it. Cook was a trader at Bristol, and kept an account with the plaintiffs, who were bankers in the same place. The course of dealing between them was this ; Cook lodged bills payable at future days with the plaintiffs from time to time, and drew upon them for any money he wanted in advance ; and the plaintiffs charged no interest on these advances, but used to select out of the bills in their hands such as they pleased and were nearest to the sum advanced, and discounted these bills, debiting Cook with the amount of such discount in his account. On the 26th February the balance on Cook's account with the plaintiffs was 108*l.* in his favour. On the 27th he directed his clerk to pay in to the plaintiffs other bills to the amount of about 3000*l.*, which was done ; and he applied for another advance, which the plaintiffs at first refused, but they afterwards consented to let him have about 1,400*l.* and actually entered the discount on such of the bills as they selected, amongst which the bill in question was not one. And on the plaintiffs' refusing to make Cook any further advance, he demanded this and the other bills which had not been discounted, none of which were then due : but the plaintiffs refused to deliver any of them up, alleging their right to detain them all, in case any of the discounted bills should prove bad. Those discounted bills had longer to run than the bill in question. At this time none of the discounted bills had been dishonoured ; though some of them, *beyond the amount of the present bill, afterwards were so ; and at the time of the demand and refusal the sums which the plaintiffs had advanced to Cook were considerably more than covered by the amount of the discounted bills in their hands, in the event of their proving to be good bills. Before this action was brought Cook became a bankrupt, and the plaintiffs proved their debt under his commission for the balance of their account, and in the affidavit, usual upon such occasions, they swore that they had no security for their debt, except certain bills which they specified, and which only comprehended the discounted bills, and not the bill in question. There was also some evidence at the trial of the general custom of the bankers at Bristol to keep their accounts in the same manner as the course of dealing shewn between the plaintiffs and Cook ; namely, that it was

1794.
 DAVIS
 v.
 BOWSHER.

[*489]

1794.
 DAVIS
 v.
 BOWSHER.

usual with them, upon any advance to a customer, who lodged bills in their hands, to apply such advance to the discount of particular bills, without any special agreement to that effect with such customer, or with a view to select such particular bills as the basis of the credit, or relinquish their general lien upon other securities. The cause was tried before Mr. Baron Perryn at the last assizes at Bristol when the jury found a verdict for the plaintiffs; to set aside which a motion was made, and rule *nisi* granted in Michaelmas term last. And now, the Court desired first to hear

Gibbs in support of the rule :

He admitted the general rule to be, that where a banker advanced money to a customer upon the general account between them, he had a lien for the amount of his balance upon all securities belonging to such person, which he might happen to have in his hands; but contended that if the banker made the advance upon the specific security of any particular bill, he thereby elected to abandon his general lien, and to resort to that security alone; and therefore could not justify the retaining of any other securities to provide for the possible event of that one bill being dishonoured. * * *

[490] *Lawrence*, Serjt. *contra*, [after observing upon the usage, proved at the trial, of the banker at Bristol, argued that, at all events, after the verdict in this case the bankers must be taken to have advanced their money upon the larger security. He was then stopped by the Court.]

[491] LORD KENYON, Ch. J. :

I disclaim grounding my opinion upon any particular law applicable to the City of Bristol only: I am clearly of opinion that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to shew that he received any particular security under special circumstances, which would take it out of the common rule. But it is

taken for granted by the counsel in support of the rule, that the party had a right to demand of the bankers certain bills, which were not discounted, without paying their general balance; and the whole argument is built on that mistake. I think he had only a right to demand this bill *sub modo*, namely, on paying all that was then due to the bankers: for wherever a banker has advanced money to another, he has a lien on all the paper securities which come into his hands for the amount of his general balance. It has been urged that the bankers abandoned their general lien in this case, by applying the money advanced to the discount of a *particular bill: but nothing appears to warrant such a supposition. So long as they were in advance upon the general account, they had a right to charge interest whether in one shape or another. But whether they could charge interest upon any particular bill, provided they were not in advance upon the general balance, is a question not necessary to be decided now, but upon which they may possibly find themselves mistaken whenever it comes to be fully canvassed. I see nothing, however, in this case contrary to the general rule of law, and the practice amongst bankers. It is very proper that there should be a known rule to govern the conduct of all persons of this description, whose dealings are very extensive; and that rule is, that no person can take any paper securities out of the hands of his banker, without paying him his general balance, unless such securities were delivered under a particular agreement, which enables him so to do. If we were to set aside this verdict, we should unsettle that which has always been considered as the law on this subject, and the constantly received course of trade founded upon that law. I am therefore clearly of opinion that we ought not to treat this even as a doubtful question, but that we should discharge the rule for a new trial.

1794.
 DAVIS
 v.
 BOWSER.

[*492]

ASHHURST, J. :

I entirely concur in opinion with my Lord that the general rule is, that bills paid into a banker's hands generally can at no time be taken away from him, until the party has paid him his general balance. Here the bills were paid in upon the general

1794.
DAVIS
v.
BOWSER.

account, and the balance not being settled at the time when they were demanded, the party had no right to insist upon receiving them. It would be inconvenient to commerce in general, and injustice to the plaintiffs in this particular case, to set aside the verdict which has been given.

GROSE, J. :

The question is, Whether under the circumstances of this case the bankers had not a lien upon all the paper securities in their hands for the amount of the general balance. The evidence goes to shew that they had, according to the general dealing and understanding between the parties ; and the jury having given credit to this evidence, I see no reason to find fault with their verdict, more especially as it is according to the real justice of the case.

Rule discharged.

1794.
Feb. 3.
[494]

BENT AND ANOTHER v. PULLER AND OTHERS,
ASSIGNEES OF CALDWELL & CO.

(5 T. R. 494—496.)

If A. and B. have a general running account, consisting of bills drawn by B. on C. in favour of A., and of bills and other securities deposited by A. with B., and upon the failure of B. and C., A. be obliged to take up the bills received by him from B., whereby the balance of the accounts is in favour of A., still he cannot maintain trover for the bills deposited by him with B., unless they were specifically appropriated to answer B.'s drafts on C. in favour of A., and deposited for that purpose expressly.*

THIS was an action of trover for two bills of exchange, one for 1,000*l.*, the other for 495*l.* 13*s.*, brought under an order of the Court of Chancery, on hearing the petition of the plaintiffs in the bankruptcy of Forbes and Gregory, merchants in London, and in the bankruptcy of Caldwell, Smith, Forbes, and Gregory, bankers at Liverpool. On the trial before Lord Kenyon at Guildhall the case appeared to be thus : The plaintiffs kept a banking account with Caldwell & Co., which consisted solely of bills received from them by the plaintiffs, drawn on the bank-

* *In re Broad, Ex parte Neck* (1884) 13 Q. B. D. 740, 54 L. J. Q. B. 79.

rupts in London, (who acted as bankers for Caldwell & Co. at Liverpool), on one side, and of bills and negotiable securities paid in by the plaintiffs on the other side. This account did not include any other dealings between them, though there existed other accounts between R. Bent one of the plaintiffs and Caldwell & Co. An interest account was regularly kept between the parties: when the bankers were in advance in cash, they debited the plaintiffs account with interest during such advance; when they had cash in hand, they gave credit for interest upon it. The account was balanced every three months; and the banker charged 5s. per cent. commission on the amount of the bills drawn by them, which constituted their profit. On the 28th of February, 1798, the account was balanced, in which was included all the bills received by the plaintiffs from Caldwell & Co. to that time; and, supposing them all good, the plaintiffs would then have been debtors in 8,882*l.* 8*s.* 8*d.* On the 1st, 8th, and 15th of March, the plaintiffs received from Caldwell & Co. other bills, amounting together to 445*l.* 6*s.* 3*d.* On the 18th of March the plaintiffs sent to Caldwell & Co. seven excise debentures, to the amount of 674*l.* 5*s.* 11*d.* which were received by the latter. On the 16th of March, Forbes & Co. stopped payment in London, at which time the plaintiffs had in circulation bills drawn on Forbes & Co. by Caldwell & Co. to the amount of 3,826*l.* 7*s.* 4*d.* Caldwell & Co. stopped payment on the 18th of March. On the 16th of March, about five in the afternoon, the plaintiffs sent to Caldwell & Co. fifteen bills, (of which the two in *question were part, the action being brought on two only to try the right), amounting to 3,958*l.* 5*s.* 4*d.*, which, if placed to their credit, would turn the balance in their favour 799*l.* 16*s.* 4*d.* allowing all the bills received from Caldwell & Co. to be good; but those bills were afterwards returned to, and taken up by the plaintiffs, on the failure of the drawers and acceptors. The question was, Whether the bills in question were paid by the plaintiffs to the house of Caldwell & Co. on a particular or a general account? The plaintiffs contended that they were deposited with Caldwell & Co. for a particular purpose, namely, to answer the bills given by Caldwell & Co. to the plaintiffs, and which were then running; and, that as the purpose for which

1794.

BENT

v.

FULLER.

[*495]

1794.
BENT
v.
PULLER.

they had been deposited had failed, the plaintiffs had a right to have them restored. That these bills could only have been retained by Caldwell & Co. for the purpose of indemnifying them against the payment of their own paper then in circulation; that as that paper had been returned to, and taken up by, the plaintiffs, the lien of Caldwell & Co. on the bills in question (which existed only for a particular purpose) was destroyed; and that the defendants, who represented Caldwell & Co. could not set up any defence that Caldwell & Co. could not. On the other hand it was insisted, on the part of the defendants, that the bills in question were paid into the house of Caldwell & Co. on the general account that subsisted between them and the plaintiffs, and were not deposited with Caldwell & Co. to answer the specific bills drawn by them on Forbes & Co. in favour of the plaintiffs; for that so far from there being any proof that the latter was the agreement of the parties, the contrary was evident from their general course of dealing; and that as the bills in question had not only been paid into the house of Caldwell & Co. on that general account, but had been since actually negotiated by them to Forbes & Co. to whom they were then indebted, the plaintiffs had no right to recover them back. The jury after inspecting the plaintiffs' books thought that the bills were paid to Caldwell & Co. on the general account between them and the plaintiffs, and the plaintiffs were nonsuited.

A rule was obtained, in the beginning of the term, calling on the defendants to shew cause why the nonsuit should not be set aside, and a new trial granted, and was now supported by *Erskine, Bower, and Giles*, on the grounds mentioned at the trial: but

[496] The Court were clearly of opinion that the plaintiffs were not entitled to recover under the circumstances of the case.

BULLER, J. in the course of the argument said, that in order to make it a specific appropriation of bills there must be a lodging of a bill for a bill, or at least several deposited at once as one entire transaction to answer some particular purpose; whereas

here the bills were paid in on a general running account, and the amount of the bills claimed as a deposit not even corresponding with the amount of those for which they were supposed to be deposited. And that this case must be considered in the same manner as if the question had arisen before the bankruptcy of Caldwell & Co., in which case the plaintiffs could not have compelled the bankers to deliver up the bills in question on paying the others.

1794.
BENT
v.
PULLER.

LORD KENYON, Ch. J. :

I agree with my brother BULLER that there must be either a bill pledged against a bill, or a transaction against a transaction : but here the bills were coming in day after day, not for the purpose of opposing a bill on one side of the account to another on the other, but all were paid on one general account. The plaintiffs therefore are not entitled to recover these bills on the ground that the particular purpose for which they were deposited has not been answered, because it does not appear that they were deposited to answer that particular purpose. On the trial, the jury on inspecting the books thought that this was a general banker's account, and that there was no specific appropriation of the bills in question ; and it appears to me in the same light.

Per CURIAM :

Rule discharged.

THE KING v. THE INHABITANTS OF THAT PART
OF THE PARISH OF CLIFTON, WHICH LIES IN THE
COUNTY OF GLOUCESTER.

1794.
Feb. 3.
[498]

(5 T. R. 498—506.)

If a parish be situate part in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of that part only is bad. The indictment must be against the whole parish.

THIS indictment stated that long before, &c. there was and of right ought to have been, and still is, &c. a certain common and

1974.
THE KING
v.
THE IN-
HABITANTS
of CLIFTON.
[*499]

public king's highway, leading, &c. in that part of the parish of Clifton which lies in the county of Gloucester, for all the liege subjects, &c. ; that a certain part of the same highway, situate in that part of the said parish of Clifton, which lies in the county of Gloucester, commencing opposite to a certain *public house called, &c. situate in that part of the parish of Clifton which lies in the city of Bristol and county of the same city, near, &c. and extending, &c. was on, &c. at that part of the said parish of Clifton, which lies in the said county of Gloucester, ruinous and in such decay for want of due reparation, &c. " And that the inhabitants of all that part of the said parish of Clifton, which lies in the said county of Gloucester, the said part of the common highway aforesaid, so as aforesaid being in decay ought to repair and amend when and as often as need shall require : "

To this indictment two of the inhabitants of that part of the parish of Clifton, which lies in the county of Gloucester, on behalf of themselves and the rest of the inhabitants of that part of the parish, &c. (except certain persons, called the Society of Merchant Venturers of the city of Bristol,) pleaded that the master wardens and commonalty of that society ought to repair ; traversing that the inhabitants of that part of the parish, &c. (except as aforesaid,) were bound to repair. On this traverse the replication tendered issue. And at the trial at the last Gloucester assizes before Lord Kenyon, a verdict was found for the prosecutor. A motion having been made in the last term, and a rule granted to shew cause why the judgment in this case should not be arrested, on the ground that no indictment lay against part of a parish for the non-repair of a road lying within it, without stating that the part charged had immemorially repaired, or shewing some other legal foundation for their liability.

Plumer, Bragge, Gibbs and Dauncey now shewed cause, and contended, that the indictment was maintainable, as well on the ground of reason, as of established precedent. 1. On precedent.
* * * The question was solemnly decided in *Rex v. The Inhabitants of that part of the parish of Weston under Penyard* which lies in the county of Gloucester.† The form of the indict-

[501]

† 4 Burr. 2507.

ment in that case was exactly the same as in this; and there the judges were all of opinion, not only that this was the proper form of indictment, but that it was, as YATES, J. observed, the only proper one that could be framed in such a case, where the parish lies in two different counties. And in a subsequent case of *Rex v. The Inhabitants of Great Broughton*,* ASHHURST, J. referred to the last-mentioned case with approbation, as distinguished from that then before the Court. 2ndly, As to the reasons upon which such an indictment stands, they were principally referred to in *R. v. Weston*. It is admitted, that in general the whole parish is liable to the repair of roads lying within it, but the present case is a necessary exception to that general rule, from the want of jurisdiction. * * * In answer to a question from the Court, Whether a person bound *ratione tenuræ* to repair a road could not be indicted in the county where it lay, though the person lived out of the county? They admitted that he might; but observed that it was from necessity only, for the indictment could only be brought in the county where the offence was committed; and he might be said to be an inhabitant there in legal construction, and by reason of his estate, and tenure there: but that the same necessity did not apply to a case like the present where some of the inhabitants of the parish lived within the county where the road lay.

1974.
THE KING
v.
THE IN-
HABITANTS
OF CLIFTON.

[502]

Bower, Lane and *Gaselee*, *contrà*, were stopped by the Court.

LORD KENYON, Ch. J. :

When this indictment was tried before me at Gloucester, it struck me, and after more mature deliberation I continue to think, that when the case of *R. v. Weston*† was argued, the Court were surprised by the supposed weight of an argument, which on consideration has no weight at all; the reason there given for supporting the indictment was that that was the only way in which justice could be obtained; for that, if the parties could not be indicted in that mode, there would be a failure of justice: but there was the mistake. That a parish at large is bound, of

* 5 Burr. 2700.

† 4 Burr. 2507.

1794.

THE KING
v.
THE IN-
HABITANTS
of CLIFTON.

[*503]

common right, to repair all the roads lying within it cannot be controverted : but it is supposed that when a parish lies in two counties, it is an exception to that general rule ; such an exception, however, was not even hinted at in any case on the subject or any authority whatever before the case of *R. v. Weston*. Lord MANSFIELD there said, that “the indictment must be confined to the county :” if by that expression his Lordship meant, that the indictment must be preferred in that county where the particular road lay, where the offence of not repairing happened, undoubtedly he spoke correctly : but if he thought that the indictment could only be preferred against the person or persons who lived within the jurisdiction of the Court, where the indictment was preferred, I think he was mistaken. For it is admitted *that in the instance I put of a person, who is bound *ratione tenuræ* to repair a road, living out of the jurisdiction of the County Sessions where the road is situate, he must be indicted in that county ; and yet the same objection, if it were a legal objection, would occur as well in that case as in the present. Every difficulty respecting the process may be obviated by removing the record into this court. It would be more convenient indeed, that the process on an indictment should go immediately from the Sessions against all those persons who are the subjects of it : but that cannot be done in a variety of cases ; where, for instance, an assault is committed, and the offender goes out of the county before any process can be served upon him. In this case, however, there is less difficulty than in the one I have mentioned ; because, on an indictment against a parish for not repairing a road, it is not necessary for the prosecutor to serve every individual in the parish with process ; he may compel the appearance of any two, who live within the county, upon whom the whole fine may be levied, and the rest of the inhabitants must reimburse those two under the general Highway Act.† I am not aware of any other case on the Highway Act, than those which have been mentioned. There is a case in Sir T. Raym. 476, where a question arose on the 43rd of Elizabeth, respecting the maintenance of some poor children in a parish which lay in two counties ; and Lord Ch. J. PEMBERTON, and the other judges, to whom

† 13 Geo. III. c. 78

the question was referred at Justice Hall at the Old Bailey, said that, "without any particular usage to the contrary, the parish in both counties ought to contribute their shares towards the relief of the children." Therefore, on the reason of the thing, as well as on authority, I am of opinion that this indictment should have been preferred against the whole parish, for that where the common law throws a burden on a whole parish, the whole parish must bear it: to that general rule I find no exception as to this particular case, and we cannot make an exception. I feel infinite respect for the opinions of those judges, who determined the case of *R. v. Weston*; but, however reluctantly, I must abandon the principle on which they proceeded, the reason failing; and finding on examination that the difficulties which there occurred, and which were the foundation of that decision, do not appear so *great as they were then supposed, I am bound to say that this indictment cannot be supported.

1794.
THE KING
v.
THE IN-
HABITANTS
of CLIFTON.

[*504]

ASHHURST, J. [dissented, considering that the case ought to be governed by the decision in *R. v. Weston*.]

[BULLER, J. and GROSE, J. concurred in the opinion of Lord KENYON.]

1794.
Jan. 7.

[518]

DOE, ON THE DEMISE OF JOHN TANNER THE YOUNGER,
v. WILLIAM DORVELL.

(5 T. R. 518—522.)

A. by deed conveyed lands to trustees to the use of himself for life, remainder to his son, B., for life; remainder to trustees, &c., remainder to the use of such child or children of B., and in such shares, &c., as B. should appoint, and in default of such appointment, "to the use of all and every the children of B. and the heirs of their several and respective bodies as tenants in common, but if only one such child, to the use of such only child and the heirs of his or her body;" remainder to the right heirs of A. in fee. At the time of the execution of the deed, B., the son, had two children both living. Subsequently A. conveyed the reversion in fee to C. Afterwards B. had other children, and died without appointing. Held that B.'s children took vested interests as tenants in tail, and that on the death of each child without issue, his share fell into the reversion conveyed to C.—Cross remainders cannot be implied in the construction of a deed.

THE defendant appeared and defended for the entirety of a certain close called the Common, and for four-fifths of a certain estate at Hornblotton, in the county of Somerset. The jury found a verdict for the defendant as to the former, and for the plaintiff as to the residue, subject to the opinion of this Court on the following case:

[*519] George Dorvell, being seised in fee of the premises now in question, by lease and release dated 5th and 6th of December, 1760, in consideration of 5s. and of natural love and affection for his wife and children, conveyed the same to John Pippen and his *heirs to the use of himself the said George Dorvell for life, remainder to the use of Mary Dorvell his wife for life, remainder to the use of H. Gould, for 100 years (upon trusts that did not arise); remainder to the use of John Dorvell, son of the said George and Mary Dorvell for life; remainder to the use of John Pippen and his heirs to preserve contingent remainders during the life of John Dorvell; remainder to the use and behoof of such child or children of John Dorvell by him lawfully begotten, or to be begotten, in case there should be more than one such child, in such shares and proportions, and for such estate and estates, either in fee-simple or otherwise, as John Dorvell by any deed or instrument in writing, &c. or by will, &c. should limit, direct, or appoint the same; and for want of such appoint-

ment, &c. to the use of all and every the children of John Dorvell lawfully begotten, or to be begotten, and the heirs of their several and respective bodies; lawfully issuing, as tenants in common, and not as joint-tenants; but in case only one such child, to the use of such only child and the heirs of his or her body lawfully issuing; and for and in default of all such issue as aforesaid, to the use of the right heirs of George Dorvell, for ever. George Dorvell, by lease and release, dated 2nd and 3rd March, 1792, conveyed the reversion in fee in the premises to his son W. Dorvell, the defendant, his heirs and assigns for ever. George Dorvell, Mary Dorvell, and John Dorvell, are all dead. John Dorvell made no appointment under the power reserved to him in the indentures of the 5th and 6th December, 1760. John Dorvell had six children; Jane, who was born and died an infant and unmarried, before the 5th of December, 1760; Jane, born after the death of the former Jane, and before the 5th of December, 1760: she survived her father, John Dorvell, and afterwards died an infant and unmarried; Mary, born before the 5th of December, 1760; she survived her father, John Dorvell, and afterwards intermarried with one John Tanner, had issue the lessor of the plaintiff her eldest son and heir, and is since deceased; and Anna, Nancy, and George, who were born after the date of the indentures of the 5th and 6th of December, 1760; and who died infants and unmarried in the lifetime of their father, John Dorvell.

1794.
DOR
v.
DORVELL.

Tripp, for the lessor of the plaintiff, admitted, that as the question arose on the construction of a deed, where cross remainders cannot be raised by implication, the plaintiff could not claim the whole of this estate; but contended that he was entitled to an *undivided moiety, on the ground that the limitations to the grandchildren of the settlor were not vested but contingent during the lifetime of their father, and only become vested in the two surviving children on their father's death, in the event of his not having made any appointment. This case is distinguishable from that of *Doe d. Willis v. Martin*,† where it was held that the limitations to the children were vested, liable

[*520]

† Page 324, *ante*.

1794.

DOE

v.

DORVELL.

only to be devested by the appointment of their father; because that was a settlement previous to marriage, and good against creditors. There no children were *in esse* when the limitations were created, in which case the law supposes that all the children of the marriage are to take as purchasers under the settlement; and there were no trustees to support contingent remainders. Whereas this was a settlement made after marriage, and was so far voluntary that it would be set aside, in favour of creditors, as fraudulent; and in this case there were two children *in esse* when the settlement was made; and here were also trustees to preserve contingent remainders. It is a general rule, that a deed to uses shall be construed like a will, according to the manifest intention of the parties, provided it do not contravene any rule of law; and in considering the intent it is necessary, as was said by Buller, J. in *Doe v. Perryn*,* to take the whole deed into consideration. Now this was a limitation in default of appointment to the use of all the children of John Dorvell, and the heirs of their several and respective bodies, as tenants in common: but if only one child, to the use of such only child and the heirs of his or her body. At the time of making this settlement, John Dorvell had two children living. The parties could not therefore mean that those two children should take vested interests during their father's lifetime; because then the limitation to "an only child" would be absurd. The intention was, that the limitations to the grandchildren should not be vested until after the death of their father, and in default of his appointment. * * * He also cited *Else v. Osborn*, 1 P. Wms. 387, where it was held that a limitation to the heirs of the body of the settlor then *in esse*, was a contingent remainder.

[521]

Gibbs, who was to have argued for the defendant, was stopped by the Court.

LORD KENYON, Ch. J. :

If this question had arisen on the construction of a will, the argument that cross remainders might have been implied, would have deserved consideration; for though Lord MANSFIELD said

* 1 R. R. 757.

in one case† that the presumption was against raising cross remainders, where they were to be implied between more than two, yet, he added that that presumption might be rebutted by other words in the will, and here the ultimate limitation is given “in default of all such issue,” &c. But it has been very properly admitted in the argument, that in the case of a deed, cross remainders cannot be implied. That rule, which was established in *Cole v. Livingston*,‡ has never been departed from since, and we should be removing the landmarks of real property, if we were to bring that rule into question. This case cannot be distinguished from that of *Willis v. Martin*, which was rightly decided, for the reasons then given by the Court, and which it is unnecessary for me now to repeat; in addition to those, Mr. Fearne has given further arguments in support of that judgment, in the last edition of his book. With regard to the case of *Walpole v. Conway*,§ which was mentioned in *Willis v. Martin*, as being contrary to another decision of Lord HARDWICKE in *Cunningham v. Moody*,|| and which was pressed upon us in *Willis v. Martin*, a further account of it has been found among the papers of the late Sir T. Sewell, from which it clearly appears that Lord HARDWICKE ultimately gave directions in it conformable to what he had done in *Cunningham v. Moody*. I am therefore perfectly satisfied with the decision of *Willis v. Martin*; and though a writ of error was brought to reverse our judgment in that case, it was afterwards *non-pross’d* in the House of Lords. But even if the remainders in *this case were contingent, no act was done to destroy them. The simple question here is, Whether on the death of the several children of J. Dorvell, who took as tenants in tail, their shares dropped into the reversion? and I am clearly of opinion that, as each particular child died without issue, his share fell into the reversion in fee.

1794.
 —
 DOE
 v.
 DORVELL.

[*522]

Per CURIAM :

Postea to the defendant

† *Phipard v. Mansfield*, Cowp. 800.

‡ 1 Ventr. a, 224.

§ 3 Barnard. 153.

|| 1 Ves. 174.

1794.
Feb. 7.

[522]

THE DUKE OF NORTHUMBERLAND *v.* ERRINGTON.

(5 T. R. 522—526.)

In an indenture of lease of a colliery, the two lessees covenanted jointly and severally with the lessor in manner following, viz., &c.; then followed a string of covenants in respect to the working of the colliery, wherein the lessees covenanted jointly and severally; and then came a covenant, that the monies appearing to be due should be accounted for and paid by the lessees, their executors, &c. (not saying and each of them): held this as well as the former covenants were several as well as joint, by reason of the introductory words.

THIS was an action of covenant by the present Duke of Northumberland, as heir of the late Duke, against G. W. Errington, the executor of G. Errington deceased. The declaration set forth a lease dated June 1st, 1777, by which the late Duke demised to G. Errington and John Ward certain collieries, and the use of certain fire engines for the purpose of working coals and certain buildings, &c. to hold unto the said G. E. and J. W. their executors and administrators for 21 years, under the yearly rent of a pepper corn, and subject to the covenants and provisoes therein contained. After the *reddendum* followed a string of covenants on the part of the lessees, that they would work the collieries in a proper manner, that they would once in every fortnight, deliver an account in writing of the quantities of coals worked, &c. &c. which covenants were thus introduced in the lease; "And the said G. Errington and J. Ward, for themselves jointly and severally, and for their several and respective heirs, executors, and administrators, did, and each of them did covenant, promise, and agree, to and with the said Duke of N. his heirs and assigns in manner following, that is to say." After these followed a covenant by the late Duke, to pay to the lessees, their executors or administrators, 6*l.* 15*s.* for every ton of coals which should be worked by them fit for the London Market; which said allowance, they the said G. E. and J. W. did and each of them did agree to accept in full satisfaction and discharge of all expenses attending the working, &c. Then came a proviso, "And it was thereby declared by and between the

said parties, and the said Duke did thereby covenant to and with the said G. E. and J. W. their executors and administrators, that it should and might be lawful to and for the said G. E. *and J. W. their executors or administrators yearly to sell and dispose of by land sale as many small or inferior sorts of coals, not being fit for the London Market, &c. as they could, not exceeding 1,000 tons of coals, they the said G. E. and J. W. their executors &c. paying and accounting to the late Duke &c. after the rate of 15s. per ton for the same; the same to be paid at the end of every year.” And it was thereby further agreed by and between the said parties, that an account should be stated and settled between them once in every six months, as well of the working, as of the vend of the said coals, &c. and that the monies appearing to be due, should be accounted for and paid by the said G. E. and J. Ward their executors or administrators to the said late Duke his heirs or assigns, at the end of each such six months, deducting thereout so much money as should be due to them the said G. and J. W. their executors, &c. for the working &c. at the rate before mentioned, &c. The declaration then assigned two breaches; one, that since the death of the late Duke and the defendant’s testator, divers accounts had been stated and settled between the present plaintiff and J. Ward of the working, &c. and of the vend of coals fit for the London Market, and that although divers sums, amounting to 20,000*l.* appeared to be due to the plaintiff, the same had not been accounted for and paid by J. Ward or the defendant, &c.: the other breach was, that J. Ward had, since the death of the late Duke and G. Errington, sold and disposed of divers large quantities of inferior coals not fit for the London Market, and that neither J. Ward, or the defendant, had paid or accounted to the plaintiff for the same after the rate of 15s. per ton.

The defendant pleaded (*inter alia*) that the said John Ward at the time of the making of the indenture, &c. sealed, and to the said late Duke delivered the said indenture, &c. To this there was a general demurrer.

Wood in support of the demurrer. * * *

1794.

THE DUKE
OF NOR-
THUMBER-
LAND
v.
ERRINGTON.

[*523]

1794.

**Holroyd, contra :*

THE DUKE
OF NOR-
THUMBER-
LAND
v.
ERRINGTON.
[*524]

It is obvious on considering the interest which the lessees took under the deed, as well as the manner in which the former covenants are introduced in the lease, as contradistinguished from the words of the latter covenants, that it was the intention of the parties that the latter should only be joint covenants. * * *

[525]

In *Enys v. Donnithorne*† it was doubted whether, as the whole interest survived to one lessee, the representatives of the other were answerable on the covenants which were several as well as joint, in express terms. * * * He also cited *Gainsforth v. Griffith*, 1 Saund. 60.

ASHHURST, J.† :

The first covenant in the lease, whereby “ the said G. Errington and J. Ward, for themselves jointly and severally, and for their several and respective heirs, &c. did, and each of them did, covenant, &c. with the said Duke, &c. in manner following,” that is to say, “ must, according to the general rules of construction, extend to all the subsequent covenants on the part of the lessees throughout the deed, unless there be something in the nature of the subject to restrain them to the former part of the lease.” Then is there anything in this case that should, from the nature of the subject, restrain them, so as to make the subsequent covenants only joint covenants? It is admitted, that the separate liability of each of the lessees extends to the covenants that regard the working of the collieries : and there is nothing in the nature of the thing to prevent that responsibility attaching on the latter covenants respecting the fruits of that work, the produce of the mines. It was not necessary to repeat in every covenant throughout the deed, that each of the lessees covenanted for himself and his representatives : the general words, introductory to the covenants, are sufficient to extend to all the subsequent covenants on their part. It would not have answered the lessor’s purpose, that each of the lessees should be bound separately by the covenants that relate to the working of the mines, unless each were also answerable for the produce of those mines.

† 2 Burr. 1190.

‡ Lord Kenyon had left the Court before this case was called on.

BULLER, J. :

The defendant's argument is principally founded on the circumstance of the two covenants, on which the breaches are assigned, being subsequent to the covenants on the part of *the lessor. If they had preceded the lessor's covenants, undoubtedly the defendant would have been liable separately. But it is immaterial in what part of a deed any particular covenant is inserted; for in construing it we must take the whole deed into consideration, in order to discover the meaning of the parties. In this lease certain acts were to be done by the lessor, and others by the lessees. And the general words at the beginning of the covenants by the lessees, "jointly and severally, &c. in manner following," extend to all their subsequent covenants.

GROSE, J. of the same opinion.

Judgment for the plaintiff.

1794.

THE DUKE
OF NOR-
THUMBER-
LAND
v.
ERRINGTON.
[*526]

THE KING v. HUBE AND OTHERS.

(5 T. R. 542—546.)

1794.

Feb. 12.

[542]

An indictment found at the Quarter Sessions upon the Toleration Act, 1 W. & M. c. 18, for disturbing a Dissenting congregation, may be removed into this Court by *certiorari* before verdict; and upon conviction of several defendants upon such indictment each is liable to the penalty of 20*l.* imposed by that statute.

THE defendants were indicted on the 18th section of the Toleration Act, 1 W. & M. c. 18, at the Quarter Sessions. The indictment stated that the defendants being persons of evil minds and dispositions, and not regarding the laws and statutes of this realm, nor fearing the pains and penalties therein contained, but unlawfully and wilfully intending maliciously and contemptuously to disquiet and disturb a certain congregation of Protestant Dissenters from the Church of England, assembled for the purpose of religious worship, on, &c. with force and arms at, &c. did wilfully and of purpose maliciously and contemptuously come into a certain chapel, situate, &c. the same chapel then and still being duly certified, registered and allowed, pursuant to the

1794.
THE KING
v.
HUBE.

statute in such case made and provided, and did then and there wilfully and of purpose during the time of divine worship, maliciously and contemptuously disquiet and disturb a certain congregation of Protestant Dissenters from the Church of England, being then and there assembled in the aforesaid chapel for the purpose of religious worship, in contempt of public worship, &c. and against the form of the statute, &c.

The indictment having been removed by the prosecutor, by *certiorari*, before verdict, and the defendants having been convicted before Lord Kenyon at the sittings at Westminster,

[*543]

Piggott moved, in Hilary Term, 1793, in arrest of judgment, on the ground of a defect of jurisdiction in the trial. For that before the Toleration Act the meetings of Dissenters to celebrate public worship was forbidden by various statutes; † and that Act for the first time legalised such assemblies on certain conditions, and prohibited the disturbance of them. It therefore created a new offence; the trial and punishment of which is *particularly marked out in the 18th section, which enacts, “that if any person or persons shall willingly, &c. disquiet or disturb any congregation permitted by the act, &c. such person or persons, upon proof thereof before any justice of the peace by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of 50*l.* and in default of such sureties shall be committed to prison, there to remain till the next General or Quarter Sessions, and upon conviction of the said offence at the said General or Quarter Sessions shall suffer the pain and penalty of 20*l.*” &c. By this statute he contended that the cognizance of the offence was confined to the justices in the first instance, and in the next to the Quarter Sessions, and that no indictment there found could be removed, because the penalty can only be levied upon such as are “convicted at the Quarter Sessions;” which by necessary implication takes away the *certiorari*. * * *

BULLER, J. suggested that the motion should rather be to quash the *certiorari quia improvidē emanavit*; for that the statute

† *Vide* 16 Car. II. c. 4; 22 Car. II. c. 1.

having directed the penalty to be levied on conviction, there could be no doubt but that an indictment might be found at the sessions; and that probably the indictment was good upon the face of it.

1794.
THE KING
v.
HUBE.

Another question was also started at the bar, Whether, in case the Court should be of opinion that the indictment was properly removed, the penalty to be levied on the defendants should be 20*l.* on each, or only 20*l.* altogether? that is, Whether the offence *were several or entire? Both these rules, the one to quash the *certiorari*, and the other to arrest the judgment, were directed to come on together. And in Easter Term following

[*544]

Erskine and *Knapp* shewed cause against the rules :

1st, As to the *certiorari* being taken away: it has been repeatedly held that the jurisdiction of this Court can only be taken away by express words or necessary implication. * * * 2ndly, If the conviction be legal in this case, as upon an indictment on the statute, it follows that the penalty must be severally levied on the defendants. * * * But, 3rdly, even supposing that an indictment under the Toleration Act cannot be removed here by *certiorari*, still this may be supported as an indictment at common law; and the words *contra formam statuti* may be rejected as surplusage, according to a variety of authorities. * * *

[545]

Piggott and *Morgan*, *contra* :

1st, This is no offence at common law, but a new offence created by statute. * * * The jurisdiction is ousted by necessary implication; because the penalty can only be inflicted upon conviction of the said offence at the Quarter Sessions: that therefore is a precedent condition to the levying of it. * * * 2ndly, If however, the Court should think that this has been properly tried, the only punishment which they are authorized to inflict is one penalty of 20*l.*; for the statute expressly refers the penalty to the said offence, considering it altogether as one transaction. * * *

[546]

The Court took time to consider of this case. And on its being mentioned at the beginning of this term, Lord KENYON

1794.
THE KING
v.
HUBE.

said, that they had not entertained any doubt upon any question except that which related to the *quantum* of the punishment. Whether or not each of the defendants were liable to pay the penalty of 20*l.*? and on that point they would give their opinion in the course of this term. Accordingly on this day, when the defendants were brought up for judgment,

ASHHURST, J. in passing sentence upon them, said, that the Court were of opinion that the penalty of 20*l.* was intended by the Legislature to be levied upon each offender. That otherwise the construction of the Act would be absurd; for if the penalty were single, then if there were but one offender he would pay 20*l.* and if there were twenty offenders, in which case the offence would be much increased, each would only pay 20*s.* which could never have been intended. And that the more reasonable construction was, that each of the defendants should be adjudged to pay 20*l.*

K. B. EASTER TERM.

1794.
May 24.
[593]

THE KING v. PARROT AND OTHERS. (5 T. R. 593—596.)

The lessee of a coal mine is liable to be rated to the relief of the poor though he derive no profit from the mine.

THE defendants, who are lessees of some coal mines at Exhall, in the county of Warwick, appealed to the Sessions against a poor rate, which was there confirmed, subject to the opinion of this Court on the following case; the appellants are in possession of the colliery, for which they are rated, under a lease from Messrs. Arnold and Farmer. That lease has been lost, and parol evidence was given of its contents. The lessees were bound by covenant to work the colliery, and they were bound to pay to Messrs. Arnold and Farmer a sixth part of the *money produced by the sale of the coals got from the colliery without

[*594]

any deduction on account of the expense of working. It was proved, that upon an average of the last three years, the appellants had paid 3,001*l.* 15*s.* 7½*d.* to Messrs. Arnold & Farmer, as the sixth part of the *money produced by sale of the coals got from the colliery during that time; that upon an average of the expense of working the colliery for the last three years, including the sums paid to Messrs. Arnold & Farmer, the appellants had lost two farthings and half a farthing on every ton of coals got from the colliery. That the colliery had always been, and still is, a losing adventure from the time of its being first taken by the appellants. That they must have known that it would be a losing adventure at the time when they took it; and their inducement for taking it was, that when they had worked out the coal in this colliery, they would be able to get at coal of their own, which was adjoining to it; and that this was a cheaper way of getting at it than any other which they could have adopted.

1794.
THE KING
v.
PARROT.
[*594]

Romilly and *Foster*, in support of the order of Sessions, were stopped by the Court.

Erskine, Morrice, and Stanton, contra :

It cannot be disputed, * * * that, coal mines being rateable by the express words of the statute, the *onus probandi*, that they are not beneficial in the hands of the occupier, lies upon him. But the occupier ought not to be rated, if it appear that he derives no profit from it. The reasoning of the judges in *Rowlls v. Gell*,† went expressly on that principle. There the lessees of lead mines were held not to be rateable, not because that species of property was not expressly mentioned in the statute, but because the profits of a hazardous adventure could not be the subject of rate: but on the same principle it was there held, that the beneficial owner of the mine under the crown, who received a certain profit in proportion to the value of the lead raised without any risk on his part, was rateable in respect of the actual profit so received by him. According to that case, if any person were rateable here, it was the landlord in respect of his rent, and not the lessees, who it is found derived no profit

[595]

† Cowp. 451.

1794.

THE KING
v.
PARROT.

whatever, after deducting all the expenses of the adventure. This distinction arises necessarily out of the nature of the poor rate, which is not a charge upon the land, but upon the profits derivable out of land. In *Robson v. Hyde*,† the lessee of certain land held under the city of London, was held rateable for the profits which he received from a chapel built thereon by letting out the pews. This was upon the same principle as *Rowlls v. Gell*, because of the profit derived to the owner. Lord MANSFIELD, speaking of this case in *Atkyns v. Davis*,‡ observed, that the determination went upon the most general, most universal, principles that can exist, viz. that a man the lessee of a house, which pays a rent, and yields a profit, is rateable to the poor. The reason why in general landlords are not rateable for their rent, is, because they would then be rated twice; for if the former were first rated in respect of his profits, which are commonly regarded as certain, and afterwards the landlord in respect of his rent, as the former would make his bargain accordingly, the rate paid by him would ultimately fall upon the landlord. But in *Loundes v. Horne*,§ the rector, who received a certain annual sum by Act of Parliament in the nature of rent for his tithes, was held rateable in respect of it. There *BLACKSTONE, J. said, “I do not know that it has ever been determined that no rents are assessable to the poor. *The King v. Vandervald* (2 Burr. 991) extends only to quit-rents of a manor.” And so it was expressly held in *R. v. Bartlett*, 16 Vin. 427, in the case of a parson who let his tithes to his parishioners. The true rule is, that which was laid down by BULLER, J. in the case of the London water-works;|| where he said, that “the question in all the cases was, Whether the property does produce any profit or not? That till it does yield a profit it is not rateable: but the moment it does yield a profit it becomes a fit object of taxation.” Here the property yields no profit to the lessees; and, therefore, they ought not to be rated for it.

[*596]

LORD KENYON, Ch. J.:

It is said, that this burden is to be laid where the benefit

† Cald. 338.

‡ Cald. 338.

§ 2 Black. 1252.

|| Cald. 325.

arises; but that rule cannot hold in a variety of instances that might be put. Suppose a landlord makes so hard a bargain with his tenant, that the latter derives no benefit from the farm, must not the tenant be rated to the poor? The landlord certainly is not liable. This case differs from that of *Rowlls v. Gells* in this respect; that was the case of lead mines, which are not rateable under the statute of Elizabeth; and there the question was, Whether or not the lessee were rateable for certain annual profits which he received without any risk on his part? Of the decision in that case, it is not necessary for me to say any thing at present: I will form my opinion upon that question when it arises again. But here the property is rateable under the express words of the stat. 43 Eliz. c. 2. It appears in the case that there has been a clear profit of 1,000*l.* a year since the lease was granted; and the question is, Whether the appellants, who are the occupiers of these mines, which it is admitted are rateable property, are or are not liable to be rated in respect of this property? Their objection is, that they have made an unprofitable bargain with the lessors: but we cannot examine into that; it being sufficient to make them liable, that they are the occupiers of rateable property.

BULLER, J.:

If the property be rateable, and the party rated be in the occupation of it, we cannot examine any farther, and enquire whether or not the tenant has made an unprofitable bargain.

Order of Sessions confirmed.

WAYMELL *v.* REED AND ANOTHER.

(5 T. R. 599—601.)

A vendor of goods abroad having packed them up by order of the buyer in a particular manner, for smuggling them into this country, and knowing at the time that they were to be smuggled, cannot recover the value of them against the buyer, although he was not concerned in the risk of importing the goods in this country.

In *assumpsit* for goods sold and delivered, the defence was, that the contract was a smuggling transaction. It appeared

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1794.

THE KING

v.

PARROT.

1794.

May 26.

[599]

1794.
WAYMELL
v.
REED.

in evidence that the defendants had applied to the plaintiff, who was a foreigner living at Lisle, for a quantity of lace, which he knew was intended to be smuggled into England; and for that purpose it was packed by the plaintiff in a peculiar manner, by the direction of the defendants, for the more easy conveyance of it without a discovery. A verdict was taken for the plaintiff, subject to be set aside, and a nonsuit entered, if this Court should be of opinion that the plaintiff was not entitled to recover under these circumstances. A rule having been obtained for that purpose,

Erskine and *Best* shewed cause; admitting that, if this had been a transaction between subjects of this country, the plaintiff, according to the doctrine laid down in *Biggs v. Lawrence*,* could not have recovered; neither could he, if he had been concerned in the risk of smuggling them into the country:† but they contended that the bare circumstance of knowledge that the goods were to be smuggled, could furnish no ground of objection against the plaintiff, who was a foreigner residing abroad; and who, not owing any allegiance to this country, was not bound by any moral or political ties to take cognizance of its revenue laws. And they relied upon the case of *Holman v. Johnson*,‡ as establishing the distinction they insisted upon. * * *

[600]

Bower and *Garrow*, *contra*, were stopped by the Court.

LORD KENYON, Ch. J.

It is not necessary to inquire now, Whether or not it be immoral for a native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue laws of the country? It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord MANSFIELD in *Holman v. Johnson*,§ to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon

* 3 T. R. 454—458; R. R. vol. i.
p. 740.

† Cowp. 344.

§ Cowp. 344.

† *Clugas v. Penaluna*, p. 442, *ante*.

here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid, that purpose. He cannot, therefore, resort to the laws of this country to assist him in carrying his contract into execution. What was said by Lord MANSFIELD, at the end of *Holman v. Johnson*, comes up to the present case.

1794.
 WATMELL
 v.
 REED.

BULLER, J. :

In *Holman v. Johnson*, the seller did not assist the buyer in the smuggling; he merely sold the goods in the common and ordinary course of trade. But this case does not rest merely on the circumstance of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendants in the act of smuggling, by packing the goods up in a manner most convenient for that purpose. And if he undertook to deliver the goods in that manner, knowing the use *intended to be made of them, he was offending against the laws of this country in the very contract itself.

[*601]

GROSE, J. declared himself of the same opinion.

Rule absolute.

1794.
May 30.

[607]

THE KING *v.* E. J. HOLLOND, Esq.

(5 T. R. 607—626.)

In an indictment against a public officer for a breach of duty, it is sufficient to state generally that he is such officer without shewing his appointment. Where a duty is thrown on a body, consisting of several persons, each is individually liable for a breach of duty; as well for acts of commission as for omission. In indictment against a servant of the East India Company, for offences in India, it is sufficient to charge him with a wilful breach of duty, without adding that it was corrupt. In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force. Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them.—Time and place must be added to every material fact in an indictment.—A charge in an indictment against an officer with a breach of orders, in not prosecuting a war “with all possible vigour and decision,” is too uncertain, even though the charge be made in the very words of the order given to him.

THIS was an information filed by the Attorney-General against the defendant, for malversations in office, during the time he was one of the council at Madras. [The information stated the Act 24 Geo. III. c. 25, by the 64th section of which the officers of the Crown are entitled upon a rule of the King’s Bench to exhibit an information against persons holding employments in India under His Majesty or under the East India Company; and then set forth a number of charges for alleged breaches of duty by the defendant.]

[611]

To this information the defendant demurred generally.

[This demurrer was argued in last Hilary Term by *Adam* for the defendant.

The judgment of the Court, which sufficiently explains the points in the case of general interest, was delivered in Easter Term, 30th May, 1794 by]

[622]

LORD KENYON, Ch. J. :

This is a cause of great importance to the public, and to the party accused. The great difficulties, which have been en-

countered in carrying on with effect enquiries into malversations in India, have I am afraid had almost the effect of an indemnity for offences, which deserved severe punishment. This called for the attention of the Legislature, who enacted three different statutes upon this subject; the 24 Geo. III. c. 25; 26 Geo. III. c. 16; and 26 Geo. III. c. 57. Those laws upon which this prosecution is founded are now, for the first time, as to this part of them, called into action; and the public, and particularly the servants of the East India Company, cannot but look with some earnestness towards the event of these proceedings. The trial, if the prosecution proceed to an issue in fact, may probably be in a court of novel institution; composed of persons of various descriptions, most likely, from their education, to bring to the decision of the cause a competent knowledge of the law, and the power of drawing fair conclusions in point of fact from the evidence which shall be laid before them. By the stat. 26 Geo. III. c. 57, s. 24, if the party demur, the demurrer is to be decided in this Court: under that clause the present demurrer was filed; and in the argument in last term several objections were made to the information, which we are now to dispose of. Some of those objections were general, and some applied only to particular counts.

Mr. Adam argued that three things ought to concur in every criminal proceeding; 1st, That the party accused should be apprised of the charge he is to defend; 2ndly, That the Court might know what judgment was to be pronounced according to law; and, 3rdly, That posterity might know what law is to be derived from the record. These are general propositions, to which I assent.

The first objection, which was supposed to affect the whole record, was that the defendant is charged with a breach of duty, where the discharge of the duty belonged to a body, whereof he was but one; and which duty could only be executed by the whole body. In the course of the argument the Court pretty strongly intimated their opinion against this objection. They thought that each individual of the governor and council, who did not do what in him lay to discharge his public duty, contracted by his negligence individual guilt. And upon that

1794.

THE KING
v.
HOLLOND.

[*623]

1794.
THE KING
v.
HOLLOND.

intimation I think this objection was abandoned; and was not pressed in the reply.

The second general objection was that it does not appear that the defendant was legally appointed one of the council. The information states that he was a counsellor in the room and place of Robert Maunsell during the period in which these things happened, which are imputed to him as delinquencies. We are of opinion that there is neither authority or principle, which authorises us to say that there is any defect in this point. In a criminal prosecution, or in an action, against a justice of peace or against a clergyman for any offences by either of them committed in their respective situations, every day's practice has settled that the exercise of their offices is, as against them, proof that they are bound to discharge their respective functions.

The third, and I think the last, general objection is, that the defendant's conduct is not charged to be corrupt. The statutes respecting this point do not confine this mode of prosecution to corruption only, but "every wilful breach of the trust and duty of any office or employment under the United Company by any of the officers or servants of the said United Company in the East Indies shall be deemed and taken to be a *misdemeanour at law," &c.† The information states this to have been wilful; therefore this objection has no more force than the two other general objections.

These general objections being disposed of, and some of the counts to which particular objections have been made being liable to fatal objections, which I shall presently state, I shall not go through every one of them. I cannot however avoid saying a few words on the eleventh count, which charges that the defendant, and the other persons in office, "did not commence and prosecute the war against Tippoo Sultaun with all possible vigour and decision." I have before said that we accede to *Mr. Adam's* position, that every person accused ought to know what the offence is which he is to meet upon his trial. Now what intelligence does this charge communicate to the defendant? Most certainly none at all. It is impossible for any person on this count, taking it alone, (and we must take it alone

† 24 Geo. III. sess. 2, c. 25, s. 49.

for this purpose) to divine what is meant to be proved. Therefore we are of opinion that this count is bad.

The other counts have either stated the defendant to be in a situation in which it was his duty to have done the acts, which he neglected to do, and for the omission of which he is now accused, or they state express orders which he was bound, but neglected to obey. The orders are stated to have been given by those who were empowered by the statutes to give them, and when the orders were given they must be taken to remain in force until they were revoked or contradicted.

The objection, that notice to the defendant was not sufficiently averred upon this record, seemed to be pretty much abandoned by the defendant's counsel, in consequence of what fell from the Bench in the argument. The rules stated by *Mr. Wood* in his argument seemed to shew the true grounds upon which notice is or is not required to be averred. In this case all the facts, to which this objection can be applied, arose within the presidency, when the defendant was one of the council, and therefore he was bound to take notice of them.

The objection, which has the most extensive effect, is that no time is alleged when the different facts happened which are essential to sustain the charge against the defendant. That it is necessary to state some time, when each fact happened that is material to constitute guilt, is so fully established by the cases *of the prosecutions against the rebels in 1746, by the authorities quoted in 2 Hawkins, by the case of *Lord Wintoun*,† and *Lowick's* case,‡ in the State Trials, that the question must be considered at rest. Therefore, I shall only point out briefly what are the defects in this respect in the different counts. In the first count it is stated that Tippoo had made warlike preparations; and no other time is mentioned, except whilst the defendant was one of the council, which appears upon the record to have been more than a year. It is likewise averred in that count, that the defendant could have raised a sufficient number of bullocks: but when or where that could have been done the record is silent.

1794.

THE KING
v.
HOLLOND.

[*625]

† 6 St. Tr. 17.

‡ 4 St. Tr. 718.

1794.
THE KING
v.
HOLLOND.

The seventh count states, that a rupture had taken place between Tippoo and the Company; but it is not said when that happened, nor whether or not it did happen whilst the defendant was one of the council.

The eighth, ninth, tenth, and eleventh counts are open to the same objection.

The eleventh count is also substantially bad, for the reasons I have before mentioned.

And the ninth count admits of this further objection, that it states as the foundation of that charge that Tippoo committed hostilities against part of the territories of the Rajah of Travancore, without stating where, in what part, or in what manner.

The seventeenth count is for not making provision for bills which had been drawn by the governor general and council; but when or where those bills were drawn it is not averred.

What I have pointed out as to these counts seems to be of the very essence of the offence imputed to the defendant, and, therefore, should have been stated with the usual and common averments of time and place, when and where they did happen; and why the common established forms have not been adhered to in this instance, I am at a loss to conjecture.

For these reasons, we think that judgment must be for the defendant on the first, seventh, eighth, ninth, tenth, eleventh, and seventeenth, counts. And on the other twelve counts, to which none of these objections apply, and which shew, that the pleader thought that time and place were necessary to be added to all material facts, judgment must be for the crown.

[626]

The *Attorney-General* will consider how the judgment is to be entered; as by the 24th section of the stat. 26 Geo. III. c. 57, the defendant may still plead not guilty.

THE KING *v.* R. DAVIES AND OTHERS.

(5 T. R. 626—629.)

1794.
May 30.

[626]

The general words of a statute which enacts that an indictment shall not be removed by *certiorari*, do not restrain the Crown from removing the indictment by *certiorari*; unless it appears on the face of the Act that the Crown should be bound by it.

AN indictment, which was found against the defendants at the last assizes for the county of Surrey, for keeping a disorderly house, was removed here by *certiorari* by the prosecutor. The defendants then obtained a rule, calling on the prosecutor to shew cause why the *certiorari* should not be set aside *quia improvidè emanavit*, on the stat. 25 Geo. II. c. 36, s. 10, which enacts that no indictment, which shall be preferred against any person for keeping a disorderly house, &c. shall be removed by any writ of *certiorari* into any other Court, but such indictment shall be heard, tried, and finally determined at the same General or Quarter Sessions or Assizes where such indictment shall have been preferred, &c.

[The rule having been argued, the Court pronounced judgment as follows:]

BULLER, J. : *

[628]

I do not see what purpose the issuing of this *certiorari* can answer; because, as the indictment was preferred at the Assizes, the place of trial is the same, with this difference only, that it will now be tried on the civil, instead of the criminal, side of the hall. But the question here is, Whether or not we are warranted in saying, that the Crown is precluded by this Act of Parliament from removing the indictment by *certiorari*? The general rule is, that where the *certiorari* is taken away by Act of Parliament the Crown is not included in the restriction, unless there be some words in the Act to shew that the Legislature so intended it. There are no such words in this Act: but, on the contrary, the Act is made against persons keeping disorderly houses; the 8th and 9th sections were inserted to guard against "the many

* Lord Kenyon being gone to the Guildhall Sittings.

1794.
THE KING
v.
DAVIES.
[*629]

subtle and crafty contrivances of persons keeping *disorderly houses," &c. and the object of the tenth section, which takes away the *certiorari*, was to prevent any delays that might be attempted to be made by those persons. The whole scope of the Act was to render the punishment of such offenders more effectual. And as there are no words in the Act to extend this restriction, respecting the *certiorari*, to the case of the Crown, the general rule applies that the prosecutor is entitled to a *certiorari*. Though, perhaps, the prosecutor would have acted more discreetly by suffering the indictment to remain in the Court where it was found, I cannot say from any authority, that he has precluded himself from removing the record by any step which he took below; for that would equally apply to all prosecutions where bail had been put in below: but that is not even contended for.

GROSE, J. :

We cannot break in upon the general rule, which has been so long established, that the Crown is not bound by the general words of a statute taking away the *certiorari*, unless it appear upon the face of the Act of Parliament, that the Legislature intended that the Crown should be bound. The observations made by my brother BULLER on this statute are very strong to shew that the Legislature did not intend to restrain the Crown in this case. Therefore the rule must be discharged.

Rule discharged.

K. B. TRINITY TERM.

1794.
June 25.
[649]

MITCHELL v. TARBUTT AND OTHERS.
(5 T. R. 649—651.)

Where the ground of action is a pure tort, the defendant cannot set up (by plea in abatement or otherwise), that others were joint wrong-doers.

THIS was an action on the case for negligence, wherein the declaration stated, That whereas one J. Jones and one G. Bolland,

at the time of committing the grievance thereafter mentioned, were possessed of a certain ship called the *Albion*, which was then proceeding on a voyage from Jamaica to Bristol, and that there were then on board the said ship 600 hds. of sugar belonging to the plaintiff; and that whereas the said G. Tarbutt, N.A., J. H., D. T. and J. E. (the defendants,) were at the time when, &c. possessed of a ship called the *Amity Hall*, whereof one G. Young was then master, then also sailing on the high seas, and the said G. Young, their servant in that behalf, then and there had the management of the said ship *Amity Hall*; yet, that the defendants, by their said servant, so negligently navigated their ship that the said ship by the negligence of their servant with great force struck against the said ship of Jones and Bolland, then sailing with the plaintiff's goods on board, and so damaged the goods that they were wholly lost to the plaintiff. To this the defendants pleaded in abatement, that the grievance (if any) was committed by the defendants, and one A. Shakespear, *C. Bryan, S. Orr, and J. Neuffville jointly, and not by the defendants only. To which there was a general demurrer, and joinder.

1794.
MITCHELL
v.
TARBUTT.

[*650]

Giles, in support of the demurrer, was stopped by the Court.

Wood, contra :

If the declaration had charged a personal tort on the defendants themselves, the demurrer to the plea might have been sustained; because it might have been said to have been the separate trespass of each of the parties; but the injury is expressly alleged to have happened by the act of their servant, in which case one of the parties cannot be answerable more than another. And that is the distinction between trespass and case: in the former each person to whom the act is referable is liable, but in case all the parties who are answerable should be sued jointly; especially where, as in the present instance, the act complained of is not done by themselves personally. The liability of the defendants arises from their being partners of the ship, and jointly responsible for the acts of their servants: and as they could not have sued alone for any damage done to their

1794.
MITCHELL
v.
TABBUTT.

own vessel under these circumstances, so neither ought they to be severally answerable for the acts of others. In *Boson v. Sandford*, † which was an action upon the case in which the plaintiff declared against the defendants as owners of a bark in which his goods were, and shewed that they were damaged by negligence; on a special verdict found, it was adjudged by HOLR, Ch. J., GREGORY, and EYRES, that this was a good defence, even on not guilty pleaded; but DOLBEN thought that it should have been pleaded in abatement. The difference of opinion, therefore, was only as to the mode in which the defendant should take advantage of the objection; for all the Court agreed, that he was entitled to avail himself of it in some shape or other. And to that difference must be referred the distinction which was taken between actions arising *ex contractu et ex delicto*. But that such a plea in abatement may be pleaded even to actions on the case in tort, appears from a case as far back as the Year Books, 7 H. IV. 8.‡ A man brought a writ of trespass on the case against the abbot of Stratford, and counted that he held certain land in the vill, by reason whereof he ought to repair a wall on the bank of *the Thames; that plaintiff had lands adjoining, and that for default of reparation of the wall, his meadows and pastures were drowned with water. To which Skrene says, it may be that the abbot had nothing in the land, by cause whereof he should be charged but jointly with another; or otherwise, that the plaintiff had nothing in the land which was supposed to be surrounded with water, but jointly; in which case the one cannot answer without the other; nor can the plaintiff sue any action without the joint feoffee. Upon the whole; though this would not be a good plea to an action of trespass *vi et armis*, or even if the defendants had been personally charged with the act which occasioned the loss; yet to an action on the case, where they are only charged by reason of their relation to a third person, and of their joint property in the ship, the plea may be maintained.

[*651]

† Skin. 278. *Vide* 1 Com. Dig. tit. Abatement (F. 8.) S. C.; Carth. 58; Salk. 440; 3 Lev. 258. *Vide* also 2 Show. 446; 1 Show. 28, 101.

‡ *Vide* Bro. Abr. tit. Joint ten-

ancy, pl. 12, the possession of Skrene is referred to, as one which was not denied; but the case does not appear to have been decided on that ground.

LORD KENYON, Ch. J. :

1794.

MITCHELL
v.
TARBUTT.

With regard to the last case cited, there certainly is a distinction in the books between cases respecting real property and personal actions : where there is any dispute about the title to land, all the parties must be brought before the Court. But upon this question it is impossible to raise a doubt. I have seen the case of *Boson v. Sandford*, in the different books in which it is reported, in all of which this doctrine is clearly established, that if the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; but where it arises *ex delicto*, the plaintiff may sue all or any of the parties, upon each of whom individually a separate trespass attaches. The case of *Boson v. Sandford* was treated by the whole Court as an action for a breach of contract; there indeed it was also determined that the defendant might take advantage of the objection, that all the contracting parties were not sued, on the plea of *non assumpsit*, but that being found inconvenient, a contrary doctrine has been since established.* But this being an action *ex delicto*, the trespass is several: and it is immaterial whether the tort were committed by the defendant or his servant, because the rule applies *qui facit per alium, facit per se*.

GROSE, J. :

The same distinction between the actions of tort and *assumpsit* was laid down in *Child v. Sand*; Carth. 294.

LAWRENCE, J. :

In Carth. 171, it was held that an action for a false return to a mandamus was founded on a tort, and that "therefore it might be either joint or several, at the election of the party, as in trespass," &c.

Judgment for the plaintiff.†

* *Vide Rice v. Shute*, 5 Burr. 2611; *Abbot v. Smith*, *ib.* 2614, 5; and *Germains v. Frederic*, Tr. 25 Geo. III. B. R.

† Although the question came before the Court in the now obsolete

form of a plea in abatement, the report is retained as involving the principle stated in the above head note, which I have substituted for the more technical one of the old report. —R. C.

1794.
July 7.
[713]

THE KING v. THE CHURCHWARDENS OF CROYDON.

(5 T. R. 713—714.)

A mandamus to admit a vestry clerk refused.

A RULE having been obtained, calling on the defendants to shew cause why a mandamus should not issue, commanding them to admit one Penfold to the office of vestry clerk of their parish, on an affidavit of his election,

Mingay now resisted the application on several grounds; 1st, That this was not the subject matter of a mandamus, because this was not an office known to the law; that it was a mere temporary appointment for each particular meeting of the vestry, and not a permanent office; that there were neither any fixed fees or salary annexed to it; and that the emoluments altogether depended on the will of the vestry at each meeting. 2ndly, That if a mandamus would lie, it should not be directed to the defendants, because they have no other authority to admit the person applying than any of the other parishioners. 3rdly, That if any mandamus issued, it should be a mandamus to compel the persons, charged with having the custody of the parish books, &c. to deliver them over to the person elected, and not a mandamus to admit him: and, lastly, that if there could be any regular election to this office, Smelt, another candidate, was elected,* and not Penfold; and that as Smelt was *de facto* in possession, the application should have been for a *quo warranto* information to oust him, before Penfold could be admitted.

Erskine and *Marryat* in support of the rule, mentioned a case that happened a few years ago, in which it was supposed that a similar writ had been granted to admit a vestry clerk in the parish of Whitechapel. They said that this was an office known to the law; that Dr. Burn† mentions the various parts of his duty, saying that he is chosen by the vestry, that he acts as registrar or secretary there, and that he has the custody of all

* This was stated in the defendants' affidavits. † 4 Burn's Eccl. Law, 8.

books and papers relating to the vestry. That it appeared from the prosecutor's affidavit in this case, that for many years past a vestry clerk had been chosen by the majority of the inhabitants at the vestry, that it had been agreed by the parishioners that it should be held as an annual office, and that he had always received an annual payment or salary for his trouble. They added, that as *the party applying had no other specific remedy, this case came within the general rule that the Court would in such instances grant a mandamus; desiring that if there were any informality in the application, the Court would grant a mandamus to compel the defendants or Smelt to deliver over the books and papers to the party applying.

1794.

THE KING
v.
The Church-
wardens of
CROYDON.

[*714]

LORD KENYON, Ch. J. :

No instance but one has been mentioned in which a similar application was made to this Court; and we have no satisfactory account of that case. This is not a fixed permanent office, for which a mandamus will lie. It depends altogether on the will of the inhabitants, who may elect a different clerk at each vestry. Neither is any salary annexed to this situation: if the fees are to be paid out of the poor-rates, there is an end of all prescriptive right to it. With regard to the supposed agreement made by the parishioners that this should be an annual office, it could not be obligatory longer than the parties chose to fulfil it; for it might be revoked at the next vestry. This is an office merely of a private nature; and if a mandamus were to be granted to restore to the office of vestry clerk, I should soon expect to hear of an application for a mandamus to restore to the office of a toll-gate keeper of a turnpike road. As to any other mandamus; if the party be inclined after the fate of this rule to apply for a mandamus to be directed to those who have the custody of the parish books to compel them to deliver such books to him, he must make a separate application for that purpose: but the present rule must be discharged.

Per CURIAM :

Rule discharged.

1794.
July 8.

[715]

MARY ANN DAVIS, EX PARTE.

(5 T. R. 715—716.)

An apprentice of seventeen years of age and upwards, bound by indenture (which stated her to be fourteen) for seven years, is entitled to be discharged at twenty-one.

BAILEY moved for an *habeas corpus* to bring up this person that she might be discharged from certain indentures of apprenticeship, entered into between herself of the one part, and Edward Whitehouse, Esq., of the other part, whereby she bound herself to him as an apprentice for seven years; being therein described as of the age of fourteen, but in fact being above seventeen years old at the time of the binding, and having now attained twenty-one and upwards, the indentures still subsisting. He grounded his application upon the principle that infants cannot be bound by indentures of apprenticeship beyond twenty-one; but that they may dissent from them after they arrive at that age.

[*716]

Shepherd now shewed cause, insisting that the indentures were binding upon the party, although made during infancy, and could not be dissented from now she was of full age. The 5 Eliz. c. 4, expressly warrants the binding till 24; and the 42nd and 43rd sections enact that persons who shall be bound apprentices by indentures, according to the statute, although within the age *of twenty-one at the time of making the indentures "shall be bound to serve for the years in their several indentures contained, as amply and largely to every intent, as if the same apprentices were of full age at the time of making such indentures." The Act of the 18 Geo. III. c. 47, restraining the binding of male children to twenty-one, as the 43 Eliz. had before restrained it as to female children to twenty-one or marriage, is expressly confined to parish apprentices, and leaves the law as to other apprentices as it stood before. The binding by indentures of apprenticeship is for the benefit of infants; and they are bound by all contracts made for their benefit in the same manner as if they had been adults at the time.

LORD KENTON, Ch. J. :

1794.

M. A. DAVIS,
Ex parte.

It is clear that the apprentice must be discharged. Every indenture of an infant is voidable at his election : and in such cases the master must trust to the covenant of those who engage for the infant. But where the binding is under the authority of an Act of Parliament, that takes away the power of electing to vacate the indentures. But I know of no Act which prohibits the party in a case like the present to make such election upon her coming of age. According to the argument of the counsel against the rule, an infant who improvidently bound himself to the age of fifty or upwards, would be bound to serve till that time : but it is impossible to support such a proposition. This apprentice ought not to have been bound longer than till she was twenty-one ; and we ought now to discharge her.

The other Judges concurred.

HARDACRE AND ANOTHER *v.* NASH AND ANOTHER.

(5 T. R. 716—721.)

1794.

July 9.

[716]

A. by will gave two legacies of 150*l.* each to his son and daughter to be paid at twenty-one ; then he gave all his realty and personalty to his wife for life ; and after her death, one freehold estate to the son and another to the daughter ; “ but if either or both of his children should die before the wife, then those legacies which were left to them should return to the wife ; ” held that on the death of the son before the mother, the mother was entitled to the reversion of the freehold estate. The word “ legacy ” may be applied to a real estate, if the context of the will shew that such was the testator’s intention.

THIS was an action for money had and received, brought to recover the sum of 20*l.* which had been paid to the defendants, as a deposit upon a contract for the purchase of a reversion in fee of a copyhold estate at Cockhill, Ratcliffe Highway, expectant on the decease of Elizabeth Stutfield, widow of Charles Stutfield, the testator hereinafter named. At the trial of the cause a verdict was given for the plaintiffs, subject to the opinion of *this Court on the following case : John Paulin, as the agent of the plaintiffs, purchased of the defendants, as the auctioneers and

[*717]

1794.

HARDACRE

v.
NASH.

agents of Elizabeth Stutfield, the daughter of Charles Stutfield, the testator hereinafter mentioned, the reversion in fee of the copyhold estate in question, and paid to the defendants on the 5th May, 1792, the sum of 20*l.* for the plaintiffs as a deposit, in part of payment of 186*l.*, being the purchase money of the reversion of the estate. Application was afterwards made for an abstract of the title to the estate, when a copy of the will of Charles Stutfield, who died seised in fee, according to the custom of the manor was delivered as a foundation of the vendor's title. By that will the testator gave and bequeathed unto his son Robert the sum of 150*l.* when of age; and unto his daughter Elizabeth the sum of 150*l.* to be paid her when of age; then he gave to his wife Elizabeth all the remaining part of his estate, effects, &c. of all kinds whatsoever, with all cash, sum and sums of money, &c. for her sole use and benefit, to enjoy it freely during her natural life. The will then proceeded thus: "Likewise it is my will and pleasure, and hereby I ordain it, that, at the decease of my wife Elizabeth the copyhold estate of mine, situate at Cockhill, Ratcliffe Highway, (the estate in question,) shall fall unto my son Robert for his sole use and benefit; likewise a freehold situate at Poplar, &c. at the decease of my wife Elizabeth, shall be given unto my son Robert as aforesaid; likewise I ordain, that after the decease of my wife, that copyhold messuage or tenement situate at Poplar, &c. (another house) shall be given unto my daughter Elizabeth, for her own use and benefit as aforesaid; but in case either or both of my children should die before the decease of my wife, then those legacies, which are here left them, shall return unto my wife Elizabeth for her sole use and benefit, and for her to dispose of freely as she might think fit;" and he appointed his wife executrix. The testator, Charles Stutfield, died in 1763, having previously surrendered to the use of his will; leaving the widow, and only two children, viz. Robert and Elizabeth, surviving him. Robert died under age and without issue, leaving his sister Elizabeth his heir at law. Upon his death the widow, Elizabeth Stutfield, named in the will, was duly admitted to the premises in question, and became seised and is still seised thereof, as the law requires. The plaintiffs objected to the validity of the title of Elizabeth

Stutfield, the daughter, the vendor *of the above mentioned reversion, and demanded the repayment of the deposit money, which was refused; the vendor insisting that such was a good title to such reversion. The deposit money has not been paid over to Elizabeth Stutfield the daughter.

1794.
HARDACRE
v.
NASH.
[*718]

Shepherd, for the plaintiffs, contended that the widow took the fee simple in the estate in question on the death of her son Robert. The question arises on that part of the will, which says, "in case either or both of the devisor's children should die before the wife, those legacies, &c. shall return to the wife." If the word "legacies" extend to the real estate, the widow is entitled to the fee. Now it has been held that that word may apply to real estates, if it appear to have been the devisor's intention that it should be so applied; as in *Hope d. Brown v. Taylor*;† where Lord MANSFIELD said, "The explanation of the word legacy must be governed by the intention of the testator;" and "it is most agreeable to the intention of the testator in this case to construe this word legacy to extend to land." * * *

Wood, contrà :

[719]

It may be admitted that, where it clearly and unequivocally appears to be the devisor's intention that legacy should be applied to real estates, it may have that effect; but that does not appear to have been the intention of this devisor. * * * Not only technically but generally speaking, a legacy means only a pecuniary bequest; and here that word may be satisfied by referring to the two preceding legacies of 150*l.* each, without extending it to the real or copyhold estates. * * *

[*Shepherd* was heard in reply.]

[720]

Cur. adv. vult.

LORD KENYON, Ch. J. (after stating the case) now delivered the opinion of the Court :

Although my brother LAWRENCE was not in Court when this

† 1 Burr. 268.

1794.

HARDACRE

v.
NASH.

[*721]

case was argued, he has seen and considered the case, and I have his authority for saying that he concurs in the opinion which I am about to deliver. The question arises on the last clause of the will ; “ but in case either or both of my children should die before the decease of my wife, then those legacies which are here left them shall return unto my wife Elizabeth for her sole use and benefit, and for her to dispose of freely as she might think fit.” And the question is, Whether those words of remainder operate on the real estates before given to the son, or only refer to the pecuniary legacies ? We have considered the whole of this will, and are of opinion that those words act upon the real estates before given to the son, in the event of his surviving the widow. That some part of the devisor’s property was intended to go over to the widow on her surviving her son is extremely clear ; and the only question is, Whether the devisor meant that the pecuniary legacies or the real estates should go to her in that event ? It is to be observed that before anything is given to the widow, these legacies of 150*l.* are given to the son and daughter when of the *age of 21. The father meant that those sums should be paid absolutely to his children when of age, for the purpose of setting them out in the world. Considerable stress was laid on the word “ legacies ; ” and it was argued by the counsel for the defendants that that word was an appropriate term, applicable to personal estate only : but the same technical and correct expressions are not to be expected from unlettered persons as are usually found in wills drawn by professional men. Even if there were no decision to warrant us in saying that the word “ legacy ” may be applied to a real estate, if the context required it, I should have had no difficulty in making such a determination for the first time. But that construction has already been put on the word “ legacy ” in the case referred to in the argument, *Hope d. Brown v. Taylor*. Without entering into the detail of that case, it is sufficient for us now to say that we fully subscribe to the doctrine there laid down. In this will after the legacies of 150*l.* each were given to the children, there is one compendious clause giving everything to the widow for life ; out of that general fund provision was made for the two children in the event of their surviving their mother ; but looking forward to

another event, namely, that of the mother surviving her children, the devisor provided for that event by the last clause ; but in case either or both of my “children should die before the decease of my wife, then those legacies, &c. shall return unto my wife,” &c. The word “return” is not indeed a very correct word : but it is not too much to say that in this will it refers to part of that general mass before given to the wife. Upon the whole this seems to be the fair construction of the will ; and it is a more natural construction than to apply the word “legacies” only to the small pecuniary legacies before given to the children, and which would perhaps be spent by them. As therefore the daughter could not convey a legal title to the copyhold estate in question, we are all of opinion that the plaintiffs are entitled to recover back the deposit money which they have paid in part of the purchase of this estate ; and that the

1794.

HARDACRE

v.

NASH.

Postea must be delivered to the plaintiffs.

C. P. EASTER TERM.

1789.

[5]

BEAVAN *v.* DELAHAY AND LEWIS.

(1 H. Bl. 5—9.)

A custom that a tenant may leave his away-going crop in the barn, &c. of the farm, for a certain time after the lease is expired, and he has quitted the premises, is good, and the landlord may distrain the corn so left, for rent arrear, after six months have expired from the determination of the term: (notwithstanding the statute 8 Anne, c. 14, s. 6, 7.)*

REPLEVIN—for taking corn on the 20th of September, 1784, at Peterchurch in the county of Hereford.

Avowry and cognizance—*Locus in quo* part of certain lands, &c. of which the avowant Delahay was seised in fee, and which he demised on the 2nd of February, 1780, to one William Beavan for one year, and so from year to year as long as both parties should please, at the rent of 168*l.* payable half-yearly. William Beavan entered on the 3rd of February, 1780, and continued in possession till the 2nd of February, 1784, when the demise ended. Within the parish of Peterchurch an ancient custom, That every tenant and farmer of any lands, under any demise, from year to year, at the will of the parties, shall have to his own use, and reap at seasonable and proper times, his away-going crop, that is, all the corn growing upon the said lands, which, before the expiration of such term, hath been sown by such tenant and farmer upon any part of such lands, being arable land, not exceeding one third part of the arable lands so held under such demise, and which hath been left standing and growing upon such lands at the expiration of such term; and also deposit such away-going crop, when reaped, in the barns and out-houses, if

* [The custom as to an away-going crop may be controlled by the agreement of the parties, *Doraston v. Green*, 16 East, 71. And where by such agreement a right is reserved to the tenants to take the crop, it is a prolongation of the term as to the land on which it grows, and the possession of the land continues in the tenant

until it is taken. Per BAYLEY, J., *ibid.* p. 81. See also *Beaty v. Gibbons*, 16 East, 116, and *Earl of St. Germans v. Willan*, 2 B. & C. 216. The Statute, 8 Anne, c. 14, s. 6 and 7, is not confined to cases of a tortious holding over, or to a holding of the whole. *Nuttall v. Staunton*, 4 B. & C. 51.]

any such there be, parcel of such demised premises convenient in that behalf, and thresh the same there, and keep the same in the *grain there then arising in such barns and out-houses, until the first day of May next after the reaping of such corn. On the 1st of August, 1784, William Beavan the tenant reaped his away-going crop, and placed and deposited the same in the said places in which, &c. being the barns and out-houses parcel of the said demised premises, and kept it there till the said time when, &c. which was before the 1st of May next after the reaping of the same, under the custom—rent arrear, distress, &c.

1788.
BEAVAN
v.
DELAHAY.
[*6]

Plea in bar—protesting, no such custom, confesses that the demise ended on the 2nd of February, 1784, but says that the said goods and chattels were taken and distrained after the expiration of six calendar months next after the end and determination of the said demise, &c.

To this there was a general demurrer.

Lawrence, Serjt., in support of the demurrer, argued that although the distress was taken after six months had elapsed from the determination of the demise, yet the landlord had a good right to distrain. The case in *Keilway*, 96, a, is an express authority in point.—The tenant had an interest in the premises upon which the distress was so taken, by the custom of the country. By the feudal law, non-payment of rent, and non-performance of services occasioned a forfeiture of the feud. But in process of time, the remedy by distress was substituted in lieu of forfeiture. (*Gilb. Law of Replevin*, p. 3.) Wherever therefore a forfeiture might be incurred; there a distress might be taken. In the present case the tenant might have forfeited by several means the interest which the custom gave him, and being so liable to forfeiture he was also liable to distress. In 1 *Rol. Abr.* 670, pl. 10, it is laid down, that the landlord cannot distrain after the end of the term, because there is no privity of estate between him and the tenant, but this admits, that where there is such privity, a distress may be taken; and in the case before the Court there is such privity by the operation of the custom. In the case of *Stanfill v. Hicks*, 1 *Ld. Raym.* 280, it was determined, that there could be no distress, where the tenant

1788.
BEAVAN
v.
DELAHAY.

[7]

had different interests in the estate, which implies, that where the interests of the tenant are the same, the landlord has a right to distrain; here, there is a continuation of the same interest, the custom of the country extending the term till the day specified. That such a custom is good appears from *Wiglesworth v. Dallison*, Dougl. 201, and the case of *Lewis v. Harris*, tried before Chief Baron Skynner, at Hereford Summer Assizes, 1778.†

Kerby, Serjt., contended that the avowry was inconsistent, as it states the term to have ended on the 2nd of February, 1784, and that until that time the tenant continued in possession; and sets up a custom that he should keep possession of the barns, &c. for putting in his corn till the 1st of May, after the reaping of the corn.—By the statute 8 Anne, c. 14, s. 6, a power is given to landlords, which they had not at common law, to distrain after the expiration of the term granted, but it is expressly limited by the 7th section, to the period of six months after such expiration. In the present case it appears by the avowant's own statement,

[7]

† *Lewis v. Harris*, Summer Assizes at Hereford, before Chief Baron SKYNNER, 1778.

Trover for a quantity of wheat—Plaintiff proved the taking and conversion—Defendant justified under a distress for rent. The distress was made in March, the Term having ended the Candlemas twelvemonth before; but it was during the time the wheat was in a barn, part of the demised premises, and also during the time allowed by the custom of the country to the off-going tenant to get in and dispose of his off-going crop.

Kenyon, for the defendant, insisted, that the tenant's right to these advantages was a continuance of his term in that part of the lands to which it extended, and was, as it were, an excrescence of his term. Therefore the distress was during the term, though more than six months after it had expired in the rest of

the farm.

Bearcroft insisted, for the plaintiff, that it was bad by common law, and not within the statute 8 Anne, c. 14, s. 7.

SKYNNER, Ch. B.:

The question is new to me; I must resort to the reason of the thing. The tenant entered originally on part only, and could not have the benefit of the residue. During his right to continue he was immediate tenant, and could have maintained trespass while his customary right continued. ("He offered *Bearcroft* a case for the opinion of the Court, but the matter being of small value, it was, with *Kenyon's* consent, reserved for his further consideration, and the plaintiff had a verdict subject to his opinion.")

He afterwards continued of the same opinion, and a nonsuit was entered.

that the distress was taken contrary to the statute, being long after six months had expired subsequent to the determination of the demise.

The case in *Keilway* ought to have little or no weight, as it has been contradicted by the legislature in the 8th of Anne, and as it appears to have been against the opinion of two judges of the Court in which it was decided. It is also an anonymous case, and does not shew upon what occasion it came before the Court.

The case of *Wiglesworth v. Dallison* proves only the goodness of a custom to take away an off-going crop after the expiration of the term; it does not establish a right to distrain six months after the term has expired, against the express authority of an Act of Parliament, nor does it authorize a tenant to keep possession of a barn, &c. after the expiration.

The case of *Lewis v. Harris* was trover by the tenant against the landlord, in which the tenant claimed to hold the premises beyond the term, who ought therefore to submit to all the powers which a landlord has over a tenant. There the Chief Baron went into the equity of the case, saying, that as the tenant did not come into possession of part of the premises, till after the commencement of the term, it was but just that he should continue, after it ended. At best that was a mere *nisi prius* decision, which appears to have been acquiesced in, because the value of the corn was too small to hazard any further expense.—The case of *Stanfill v. Hickes* is strongly in favour of the present plaintiff, which lays it down, that where the tenant has two interests in the premises, no distress can be taken. Here the tenant had two different interests, one arising from the demise, and the other from the custom, supposing the custom to be good.

Lawrence in reply :

The term was continued by the custom of the country till the 1st of May after the harvest; and if it continued for one purpose, it must also continue for every other. As the tenant might hold possession of the barn, &c. so all the rights of the landlord attached upon him, and with those rights, that of distress.

The Court took a few days to consider, after which

1788.

BEAVAN
v.
DELAHAY.

[8]

1788.

BEAVAN
v.
DELAHAY.

LORD LOUGHBOROUGH delivered their opinion as follows :

A few short principles are sufficient to determine the present case. If by tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract, must also be continued. It has been often determined, that if there be a lease, and after the determination of it the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants of the lease. The rights therefore of the landlord must in such case continue. Now it is not material whether the interest and connection between the landlord and tenant be extended, by such holding over, or by the operation of a custom like the present.

I have seen Sir John SKYNNER, and consulted him on the case of *Lewis v. Harris*, which I find was correctly stated at the bar. On that case he took the opinions of all his brethren of the Exchequer, who agreed with him in his decision, which was acquiesced in, and never afterwards called in question.

Judgment for the defendants.

C. P. TRINITY TERM.

1788.

[17]

FIELDER v. STARKIN.

(1 H. Bl. 17—20.)

Where a horse has been sold warranted sound, which, it can be clearly proved, was unsound at the time of sale, the seller is liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness.

THIS was an action on the warranty of a mare, “that she was sound, quiet, and free from vice and blemish.”

Plea, *Non-assumpsit*, on which issue was joined.

The cause came on to be tried at the last Assizes at Thetford, before Mr. Justice Ashhurst, and a verdict found for the plaintiff. It appeared on the trial, from the learned judge’s report, that

the plaintiff had bought the mare in question of the defendant at Winnel fair, in the month of March, 1787, for 80 guineas, and that the defendant warranted her sound, and free from vice and blemish.—Soon after the sale, the plaintiff discovered that she was unsound and vicious, but kept her three months after this discovery, during which time he gave her physic and used other means to cure her. At the end of the three months he sold her, but she was soon returned to him as unsound. After she was so returned, plaintiff kept her till the month of October, 1787, and then sent her back to the defendant as unsound, who refused to receive her. On her way back to the plaintiff's stable, the mare died, and on her being opened, it was the opinion of the farriers who examined her, that she had been unsound a full twelvemonth before her death. It also appeared that the plaintiff and defendant had been often in company together during the interval between the month of March, when the mare was sold to the plaintiff, and October, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstance of her being unsound. The jury found a verdict for the plaintiff with 80 guineas damages.

1788.
FIELDER
v.
STARKIN.

[18]

Le Blanc, Serjt., having obtained a rule to shew cause, why the verdict should not be set aside and a nonsuit entered;

[*Adair*, Serjt., having shewed cause,]

Le Blanc, in support of the rule, confined himself to the question, Whether the plaintiff had used due diligence to return the mare to the defendant, and had given reasonable notice of her being unsound? This, he argued, was a question of law, arising out of facts. The undisputed facts were, that plaintiff had early discovered the unsoundness of the mare, but he took no pains to make inquiry for the defendant, to give him notice of the mare being unsound, or to return her till six months after he knew she was unsound. The inference of law from these facts must be, that he has not used due diligence, nor given reasonable notice to the defendant. This is like the case of a bill of

[19]

1788.
FIELDER
v.
STARKIN.

exchange being dishonoured, where it is necessary in order to make the indorser liable, that the holder of the bill should use due diligence and give reasonable notice to the indorser. But in such case what is due diligence and reasonable notice, is a question of law arising from particular circumstances.*—The plaintiff in the present case, was so far from returning the mare in proper time after he knew her to be unsound, that he endeavoured by every method to cure her, and exerted the highest act of ownership, by selling her to a third person.

LORD LOUGHBOROUGH :

Where there is an express warranty the warrantor undertakes that it is true at the time of making it. If a horse which is warranted sound at the time of sale, be proved to have been at that time unsound, it is not necessary that he should be returned to the seller. No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages, without either a return or notice. If on account of a horse warranted sound, the buyer should sell him again at a loss, an action might perhaps be maintained against the original seller, to recover the difference of the price. In the present case it appears from the evidence of the farriers who saw the mare opened that she must have been unsound at the time of the sale to the plaintiff.

GOULD, J. of the same opinion, remembered many cases of express warranty, where a return was not held to be necessary.

HEATH, J. :

If this had been an action for money had and received to the plaintiff's use, an immediate return of the mare would have been

* *Tindal v. Brown*, R. R., vol. i., p. 171.

necessary; but as it is brought on the express warranty, there was no necessity for a return to make the defendant liable.

1788.

FIELDER

v.

STARKIN.

[20]

WILSON, J. of the same opinion, recollected a cause tried before Mr. Justice BULLER, at *Nisi prius*, where the defendant had sold the plaintiff a pair of coach-horses and warranted them to be six years old, which were in reality only four years old. It was contended that the plaintiff ought to have returned the horses; but Mr. Justice BULLER held, that the action on the warranty might be supported without a return. As to part of the evidence being contrary to the verdict, the jury have a right to use their discretion either in believing or disbelieving any part of the testimony of witnesses.

Rule discharged.

DOE, ON THE SEVERAL DEMISES OF THOMAS DAVIES
AND JAMES WILLIAMS, THE YOUNGER, v.
THOMAS WILLIAMS.

1788.

[25]

(1 H. Bl. 25—27.)

A deed of release of a house, mill and lands called Clock Mills, and "all lands, &c. belonging, used, occupied, and enjoyed, or deemed taken or accepted as part thereof," &c. will pass leasehold lands which have been occupied with, and are reputed part of Clock Mills, as well as freehold, especially against the releasor.

EJECTMENT for three acres of land called Portway, tried before Mr. Justice Heath at the last Assizes for Hereford. The title of the lessors of the plaintiff was founded on an indenture of release of the 23rd of October, 1781, between James Williams, the elder, James Williams, the younger (the lessor of the plaintiff), and Thomas Williams (the defendant) of the first part; James Maddey of the second part; and Thomas Davies (lessor of the plaintiff) of the third part; by which the parties of the first part conveyed all that messuage, mill, and lands, called Clock Mills, in the possession of James Williams, the elder, James Williams, the younger, Thomas Williams, or some or one of them, and all lands or meadows to the said messuage or mill belonging; or

1788.
DOE
v.
WILLIAMS.

used, occupied, and enjoyed, or deemed taken or accepted as part thereof, to Thomas Davies as a trustee for the payment of an annuity to James Williams the elder, for life, remainder to James Maddey for forty years, to raise portions, &c. remainder to James Williams, the younger, in fee.

The lands in dispute were holden for the remainder of a term of 1,000 years, but had been occupied with, and reputed part of the Clock Mill estate from the year 1748 to 1785.

In May, 1785, the defendant got into possession; on whose part it was objected at the trial, that these lands being leasehold, did not pass by the release of 1781. The learned judge therefore directed a verdict to be found for the plaintiff, with liberty for the defendant to enter a nonsuit, if the opinion of the Court should be in his favour.

Le Blanc, Serjt., having obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered,

Adair and *Runnington*, Serjts., shewed cause:

[26] Under the deed in question, the leasehold lands must be taken to pass as well as the freehold. The cases which have established the rule of law, that where the general words, "lands, tenements, and hereditaments," are used, freehold lands only will pass, has arisen on the construction of wills containing no specific local description of other lands not freehold. Though it may be fair to infer, that where the enumeration of lands concludes with the word hereditaments, only lands of inheritance will pass, yet where in a deed there is so exact and specific a description as the present, there leasehold lands which have in fact been holden with and deemed part of the same estate with the freehold for a considerable length of time, must be included in that specification. If this be denied, the right of the grantor to convey them is denied; for as he has described all the premises, if the leasehold be not allowed to be included in that description, his right to include them is denied, and his intention frustrated.

Le Blanc, *contra* :

The leasehold lands cannot pass by this deed, if either the

nature of the conveyance or the words of it be considered. The nature of a lease and release, is adapted to freehold, but not to leasehold estates; the proper conveyances of term for years being by assignment.

1788.
DOE
v.
WILLIAMS.

The words "all lands," &c. must be construed to mean only freehold, since there are freehold lands sufficient to answer them.

In the construction of wills, where great latitude is allowed to the intention of the testator, it has been uniformly decided even against strong indications of intention, that where general and comprehensive words are used in the disposal of lands, if there be freehold lands to which those words will apply, such lands only will pass. If it be thus with respect to wills, much stronger will the case be with respect to deeds, where no particular regard is paid to intention: *Rose v. Bartlett*, Cro. Car. 292; *Day v. Trigg*, 1 P. Wms. 286; *Davies v. Gibbs*, 3 P. Wms. 26; *Knotsford v. Gardiner*, 2 Atk. 450; *Pistol* on demise of *Randal v. Riccardson*, B. R. Hil. 24 Geo. III.†

LORD LOUGHBOROUGH:

This being a case arising on a deed, is to be distinguished from those of a like nature which have arisen on wills. In general, where there is a question on the *construction of a will, neither party has done any thing to preclude himself from the favour of the court. But in the present instance, the rule of law applies, that "a deed shall be construed most strongly against the grantor." For if it be determined that the lands in dispute did not pass by the release of 1781, the defendant will be permitted, after an interval of near forty years, to invalidate his own conveyance, for the purpose of obtaining an unjust possession.

[*27]

GOULD, J.:

This not being the case of a devise, is not governed by *Rose v. Bartlett*, or the others cited. But even if a devise had been made in such specific and particular words as are contained in this deed of release, I should have very little doubt but that all lands would pass, as well leasehold as freehold. My Lord has taken a just distinction between the construction of devises and

† 2 P. Wms. 459, n.

1788.
DOE
 v.
 WILLIAMS.

deeds of conveyance, as to the equal favour to which both parties are entitled in the former, and the strictness which ought to prevail in the latter. The word "grant" is as proper to convey leasehold as freehold property.

HEATH, J., of the same opinion.

WILSON, J. :

The rule of construction established in *Rose v. Bartlett*, and the other cases, with regard to devises, does not extend to the present case of a deed. A conveyance by lease and release is certainly most properly used to pass estates of inheritance, but it may also convey a leasehold interest. If the leasehold lands had been expressed as such in this deed, they would clearly have passed ; if the intention of the parties at the time was to convey them, they shall also pass. That such was their intention sufficiently appears from the circumstances of the case, and from the lands having been considered as part of the Clock Mill estate during such a number of years. The defendant, who was one of the grantors, shall not be suffered to deny the effect of his own deed.

Rule discharged.

1788.

[37]

JOHN COOPE, JOSEPH COOPE, WILLIAM JESSER
 COOPE, CHARLESSON, PIERCY THE ELDER,
 PIERCY THE YOUNGER, PRITZLER, AND BROWN
 v. EYRE, ATKINSON, WALTON, HATTERS-
 LEY, STEPHENS, AND PUGH.

(1 H. Bl. 37—48.)

A. B. C. and D. enter into an agreement to purchase goods in the name of A. only, and to take aliquot shares of the purchase ; but it does not appear that they are jointly to resell the goods. On failure of A. the ostensible buyer, B. C. and D. are not answerable to the seller as partners with A.

THIS was an action brought by the owners of a Greenland ship called *The Earl of Chatham*, against the defendants, on an agreement to purchase oil, the cargo of the ship.

[The declaration stated the agreement as one whereby the defendants became jointly liable for the price of the oil.]

1788.

COOPE

v.

EYRE.

[38]

The action was tried at the Sittings after last Hilary Term, before Lord Loughborough by a special jury, when it appeared, that on the 24th of August, the defendants, Eyre for himself and partners (who were Atkinson and Walton, general merchants) Hattersley for himself and Stephens who were oil merchants, and Pugh for himself and Son,* who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. That Eyre should be the ostensible buyer, and the others share in his purchase at the same price which he might give. Hattersley & Co. were to have one-fourth, Pugh one-fourth, and Eyre & Co. the remaining moiety. That they bought large quantities of oil belonging to other ships, and other traders besides the plaintiffs, in the name of Eyre & Co. That Hattersley and Pugh occasionally came forwards and gave directions as to the delivery of the oils, and otherwise interfered in the transaction, and also made many declarations, "that they were all jointly interested in the different purchases, and that there was a general concern between them."†

On the part of the defendants, it was insisted on at the trial, that the contract for sale was made between the plaintiffs and Eyre & Co. only, and that the agreement which the defendants entered into between themselves, was only a sub-contract, and did not constitute a partnership. Lord LOUGHBOROUGH, after declaring his opinion (that as the defendants did not appear to have been jointly concerned, further than the purchase of the oil, they had not such a joint interest in the profits and loss as the law made necessary to a partnership), directed a verdict to be found for them, which was accordingly done.

[39]

Marshall, Serjt., having obtained a rule to shew cause, why a new trial should not be granted on the misdirection of the judge in Easter Term, [the case was argued in the preceding term].

Cur. advis. vult.

* The son died before the action was brought.

† [The evidence upon this point is stated in a note to the original report.]

1788.

COOPER

v.

EYRE.

[42]

In this Term the Judges delivered their opinions as follow :

GOULD, J. :

The facts of the present case are shortly these ; The defendants and Eyre & Co., order one Garforth a broker to buy quantities of oil.—The defendants Hattersley & Co. and Pugh & Co. were to have for their respective shares, each one-fourth.—The broker buys divers ship-loads ; and to some of the vendors, the defendants, during the treaty, declare it to be a common concern between them and Eyre & Co., in whose name the purchases were made.

But with respect to the plaintiffs, the purchase was made singly in the name of Eyre & Co., without any notification that the defendants had any concern in it.

[43] These purchases were made on speculation, there being a prospect that oil would rise in price ; but it afterwards fell, and then the defendants contend that they are not liable to make good the difference, Eyre & Co. having failed.

Upon these facts, two questions arise, 1st, Whether the defendants are partners with Eyre & Co. ? 2nd, If not, Whether they are to be deemed joint-contractors in the purchase for Eyre & Co. and so liable for the whole ?

As to the first, I think they cannot be considered as partners with Eyre & Co. in this purchase from the plaintiffs. Although there may be partnerships in many other instances besides what are merely commercial, as in the case of farms rented by several persons jointly, and of partnerships of attorneys, and the like, yet I think the true criterion is as stated by Mr. J. BLACKSTONE, in the case of *Grace and Smith*, “Whether they are concerned in profit and loss,” and the same doctrine is in effect held by Chief Justice DE GREY, in that case.*

This is strongly illustrated by *Bloxam and Fourdrinier v. Pell and Brooke*, in B. R. which was cited in *Grace v. Smith*. It there was agreed, that whether the sum of money was a fresh loan, or left in the hands of the man who was originally

* This dictum is no longer an authority, since *Cox v. Hickman*, 8 H. L. C. 268. See Lindley, Book I., Ch. I., s. 2.—R. C.

concerned in the trade in partnership with the person advancing or leaving the money, made no difference.

In both cases the money was left. In *Bloxam's* case he was to have (besides interest) 200*l.* per annum, as and in lieu of his share of the profits, and to have the inspection of the books.

This was properly held to continue his connection as a partner, and excluded him from being at liberty to set himself up as an usurer.

In the case of *Grace and Smith*, *Smith* stipulated to have, besides interest, an annuity of 300*l.* per annum, but not a word to refer it to the trade.—And therefore as the jury found that the defendant was no partner, a new trial was refused, and Blackstone lays it down, that the supposition of its being usury had no influence on the question.

In both instances the annuities were limited to seven years.

It was held in both the cases, that the inequality of the concern as to profit and loss was immaterial to those who dealt with them, however it might be a regulation between themselves.

But in the present case there was no communication between the buyers as to profit or loss. Each party was to have a distinct share of the whole, the one to have no interference with the share of the other, but each to manage his share as he judged best. The profit or loss of the one, might be more or less than that of the other.

[44]

In this light I am of opinion there is no foundation for the Court to adjudge the present case a partnership; and the jury having found for the defendants, that there is no reason to disturb the verdict.

2nd. Whether they can be considered as joint purchasers?

I think it would be attended with great inconvenience in the common dealings between man and man, to admit that position.—The stipulation is, that the purchase should be made as for *Eyre & Co.* in the total, and each is to have a separate and distinct part.—A man goes into Yorkshire to buy as many horses as he can collect, or a limited number, and agrees with a friend that he shall have two. It surely cannot be contended, that this could make the friend a joint contractor to subject him in failure of the other, to pay for the whole bargain.

1788.

COOPE

v.
EYRE.

1788.
COOPER
v.
EYRE.

So in a familiar case, a man is about to buy a tun of wine and agrees that a friend shall have a hogshead.

And I think the case of *Hoare* and *Dawes* is strong on this head : I need not state the case, it having been already stated several times.

Lord MANSFIELD holds it merely “ an undertaking with the broker by each for a particular quantity, no undertaking by one to advance money for the other, nor to share with one another in profit or loss.

“ It would be most dangerous if the credit of a person who engages for a 40th part (for instance) should be considered as bound for the 39 others.”

This doctrine falls in exactly with my ideas—I think cases of this nature should stand on broad lines—not on subtleties and refinements, the source of litigation and disputes.

HEATH, J. :

The question for the determination of the Court, is whether the contract made with the plaintiffs is so far binding on the defendants Pugh, Hattersley, and Stephens, as to make them liable on the failure of Eyre & Co. ?

If this contract may be considered independently of the other contracts given in evidence, there could be little doubt.—Eyre & Co. employ Garforth, their broker, to buy oil, and it is agreed that the other defendants shall have aliquot parts when the commodity is purchased.

[45] This is a sub-contract,—by a sub-contract I mean a contract subordinate to another contract made or intended to be made between the contracting parties on one part, or some of them, and a stranger. Eyre & Co. are the only purchasers known to the plaintiffs ; entire credit was given to them alone. Pugh, Hattersley, and Stephens, can be liable only in the event of a concealed partnership, on this principle, “ that the act of one partner binds all his co-partners, on account of the communion of profit and loss.” In truth they were not partners, inasmuch as they were only interested in the purchase of the commodity, and not in the subsequent disposition of it.

Great reliance has been placed on this being a joint concern

and a joint speculation. It is so between the defendants, but the contracts made with the other vendors are different. A contract made between A. and B. cannot be given in evidence to explain a contract made between A. and C.—It is *res inter alios acta*. In fact the defendants have pledged themselves explicitly with other persons in a different manner. The contracts made with the other merchants, are not admissible evidence in this cause, except to prove a fraud, if the facts had gone that length; namely that the house of Eyre & Co. as a failing house, was to stand forwards in order to protect the other defendants, who by such means might have the benefit of the speculation if it proved fortunate, without sustaining any loss in the event of its failing. No such evidence has been adduced: on the contrary, it appears that the objection made by the other vendors to the firm of Eyre & Co. was, “that they were unknown and new in the trade.”

If Pugh, Hattersley, and Stephens had authorized the broker to purchase aliquot shares for them, this case would have resembled that of *Hoare v. Dawes*, the doctrine of which is confirmed by a passage in the Digest, lib. 17, tit. 2, Pro Socio, § 33, “qui nolunt inter se contendere, solent per nuntium rem emere in commune, quod a societate longè remotum est.”

No detriment from this decision can arise to trade, or affect the credit of merchants; for it behoves every contracting party to consider the responsibility of the persons with whom he contracts, and he has also the resource of a dormant partnership, if any such exist and can be proved. For these reasons I am of opinion that the rule ought to be discharged.

WILSON, J. :

I am so unfortunate as to differ in opinion from the rest of the Court on the present question.

The contract was actually made between the plaintiffs and Eyre & Co., but if the other defendants were jointly concerned in it, they ought to be responsible, as much as if they had personally contracted. That they were so concerned sufficiently appears from the contracts with the other merchants, and their own declarations; these I think were proper to be given in

1788.
COOPER
v.
EYRE.

1788.
COOPE
v.
EYRE.

evidence, being against themselves, to which evidence the verdict was contrary.

The defendants were all concerned in a general speculation. There was an original agreement between them to purchase as much oil as they could procure. Of what nature that agreement was, there is no evidence precisely to prove, no witness having been present when it was concluded. It might have been such as would have made them jointly answerable, or it might not. How then are we to collect what it was? Surely from the declarations of the parties themselves.

Thwaites' evidence proves that Hattersley said, "It is all the same whether Eyre or I buy it, it is the same concern." This shews it was not a sub-contract. If Hattersley had bought the oil himself, he would have been a contractor with Thwaites; and when he who knew what the agreement was between the defendants, declares it to be the same thing whether he or Eyre bought it, he puts himself expressly in the place of an original contractor; the Court then cannot say that he was a sub-contractor. This declaration was before the purchase of the cargo of the *Earl of Chatham*, on which the action is brought.

Kilbington, the keeper of Greenland Dock, proved that Hattersley and Pugh both said to him "we have purchased your oil." This was a direct avowal of their having jointly contracted, which was not done with a view to strengthen the credit of Eyre & Co. being after the purchase was made.

When Captain Dowson expressed some doubts whether Eyre & Co. to whom he had also sold his oil, were able to pay him, Pugh who received it, told him "you are safe" and declared that "he was concerned, and Hattersley was concerned, and a house at Norwich who could buy them all." Now if they were sub-contractors, this declaration was not true. How could their sub-contract make the vendor safe? Here then is clearly a direct acknowledgment of their being original contractors. The evidence also of the broker shews that they all originally contracted; he delivered accounts to them, and informed Hattersley and Pugh how matters went on. In one instance he was so conscious of their being jointly concerned, that he gave in their

names as such to the agent of Yeomans, who would not otherwise have given credit to the name of Eyre & Co.

Upon failure of Eyre & Co., Hattersley and Pugh gave orders to the keeper of the dock, not to give up the oil remaining in the dock in the name of Eyre & Co., and took it as their own. Now they could have had no right to do this if they had been only sub-contractors. Admitting that after goods are delivered, there cannot be such a participation of profit and loss as will make a partnership unless the parties originally contracted, yet their dividing the goods, and each taking his share, after delivery, will be good evidence of an original contract. Whether the contract were joint or separate, nothing done subsequent can alter the nature of it, but there may be subsequent evidence to prove of what nature it was.

In *Grace v. Smith** the terms of the contract were stated. If the terms of this contract had been stated, we might have judged of the responsibility of the defendants; but not being stated, we must receive their own acknowledgments of responsibility.

In *Hoare v. Dawes*,† the question was not between the buyer and seller; the East India Company were the sellers, and the money must have been paid before the delivery of the goods. In that case there was no agreement between the defendants, but here the declarations of the parties themselves are strong evidence of an original joint contract. They who best knew what their contract was, have declared it to be joint, and we cannot say it was separate. Being acknowledged to be joint in many instances, we must take it to be so in all.

Clavering v. Wesley‡ does not apply to the present case, being on the covenants of a lease, which only bound the parties to them. Here all the defendants were interested in the subject-matter.

It has been said that as the credit was given to Eyre & Co. only, the vendors could not be injured, if Eyre & Co. only were liable. But this argument goes to prove that no dormant partner would be answerable for the acts of the ostensible agent.

I am therefore of opinion that a new trial ought to be granted.

* 1 Black. 998.

† Dougl. 371.

‡ 3 P. Wms. 402.

1788.

COOPER
v.
EYRE.

1788.

COOPER
v.
EYRE.

[48]

LORD LOUGHBOROUGH :

The first impression on my mind was against the defendants, but in the course of the trial my opinion changed, and I thought they were not liable as partners ; I still continue to think so, and consequently that the verdict was proper.

This being an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership, in which case all the partners are liable as one individual. It has been justly observed, that a secret partnership can be no consideration to the vendor ; though for reasons of policy and general expedience the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent. In many parts of Europe limited partnerships are admitted, provided they be entered on a register ; but the law of England is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership, a communion of profits and loss is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. The late case of the cotton purchase resembled the present, so far as the several parties were each to take aliquot shares ; but there no part of the commodity was to be resold without the consent of all concerned. Here, Eyre was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them necessary to make them partners ; their agreement was a sub-contract, which, as my Brother HEATH observed, may be executory ; it was to share in a purchase to be made. The seller looked to no other security but Eyre & Co. : to them the credit was given, and they only were liable.

Rule discharged.

FULLER *v.* PRENTICE.

(1 H. Bl. 49.)

1788.

[49]

The Court will not grant an attachment against a witness for not obeying a subpoena to attend at a trial, unless the whole expenses of the journey, and of the necessary stay at the place of trial, be tendered at the time of serving the subpoena.

ADAIR, Serjt., moved for an attachment against the defendant, who lived at Brandon in Suffolk, for not appearing in obedience to a subpoena, to give evidence in a cause tried before Lord Loughborough, at the Sittings after last Easter Term, at Westminster, on the following affidavit, namely: "That she was personally served with the subpoena ticket, and that the original was shewn to her. That 2s. and 6d. were given her and a promise made her to bear all her expenses. That a place was taken for her in the stage-coach from Brandon to London. That she accordingly undertook to go in the coach at the time appointed. But when the coach was ready to take her up, and more money also ready to be given her by the deponent, she confined herself within her house and refused to go."

But the Court refused the attachment, saying that it might afford a dangerous precedent, by which witnesses coming from their places of abode to attend at trials, might be deprived of the repayment of their necessary expenses; the whole of which, as well of their going to the place of trial, as of their return from it, and also during their necessary stay there, ought to be tendered to them, at the time of serving the subpoena, otherwise an attachment would not lie.

STEEL *v.* HOUGHTON ET UXOR.

(1 H. Bl. 51—53.)

1788.

[51]

No person has, at common law, a right to glean in the harvest field. Neither have the poor of a parish legally settled (as such) any such right.

TRESPASS for breaking and entering the closes of the plaintiff, at Timworth in the county of Suffolk, treading down grass and

1788.

STEEL

v.

HOUGHTON
ET UXOR.

corn, &c. and taking and carrying away corn, barley in the straw, &c. done by the wife.

Plea—Justification, That the premises had been sown with barley, and the crop lately reaped, and carried off the land ; “ wherefore the defendants, being parishioners and inhabitants of the said parish of Timworth, legally settled therein, and being poor and necessitous, and indigent persons, after the crop growing in the year aforesaid, in and upon the said close, in which, &c. had been reaped, cut down, taken and carried away by the said plaintiff from and off the said close, in which &c. to wit, at the said times when, &c. the said Mary (the defendant) entered into the said close, in which &c. to glean and gather the straw containing ears of barley, remaining and being dispersed and scattered abroad in the said close, in which &c. after the said crop had been so reaped, cut down, taken and carried away as aforesaid, being the gleanings of the said crop so remaining dispersed and scattered abroad in and upon the said close, in which, &c.

To this there was a general demurrer.

This cause was argued in Easter Term, 1787, by *Le Blanc*, Serjt., for the plaintiff, and *Lawrence*, Serjt., for the defendants ; [52] and on a second argument in Trinity Term, 1787, by *Bolton*, Serjt., for the plaintiff, and *Rooke*, Serjt., for the defendants.

These arguments were fully entered into by the Court, who in this Term gave judgment as follows :

LORD LOUGHBOROUGH :

When the claim of a right to glean was first brought before the Court, it was laid indefinitely to be in poor, necessitous, and indigent persons. I was then of opinion against the claim.

1st, I thought it inconsistent with the nature of property which imports exclusive enjoyment.

2dly, Destructive of the peace and good order of society, and amounting to a general vagrancy.

3dly, Incapable of enjoyment, since nothing which is not inexhaustible, like a perennial stream, can be capable of universal promiscuous enjoyment.

This right is now claimed by poor persons legally settled ; but in this form also it is equally liable to objection. There can be

no right of this sort enjoyed in common, except where there is no cultivation, or where that right is supported by joint labour; but here neither of those criteria will apply. The farmer is the sole cultivator of the land, and the gleaners gather each for himself, without any regard either to joint labour or public advantage. If this custom were part of the common law of the realm, it would prevail in every part of the kingdom, and be of general and uniform practice; but in some districts it is wholly unknown, and in others variously modified and enjoyed.

Although the division of parishes is of very high antiquity, yet a right to a maintenance by settlement was first introduced by the statute of the 43 of Eliz. In ancient times tithes were divided into three parts,—the first for the maintenance of religion, the second for the church, and the third for the poor; but the third division was a matter of charity rather than of right. When by the second Lateran Council, in the 12th century,* tithes were appropriated to particular parishes, they were not considered as making in any part a provision for the poor, which might be claimed as a right.

Although the law of Moses has been cited for a foundation for this claim, the political institutions of the Jews cannot be obligatory on us, since even under the Christian dispensation the relief of the poor is not a legal obligation, but a religious duty.

The authority in our law upon which the right to glean is supported, is a dictum of Sir MATTHEW HALE, in [Duncombe's] Trials per Pais; but though I entertain the highest respect for the authority and character of that great judge, yet it would be doing injustice to his memory, to take every hasty expression of his at *Nisi prius* as a serious and deliberate opinion. In truth, that dictum imports no more than that the question could not be raised without being put upon the record.

The consequences which would arise from this custom being established as a right, would be injurious to the poor themselves. Their sustenance can only arise from the surplus of productive industry; whatever is a charge on industry, is a very improvident diminution of the fund for that sustenance; for the profits of the farmer being lessened, he would be the less able to con-

1788.
STEEL
v.
HOUGHTON
ET UXOR.

[53]

* A.D. 1139.

1788.
STEEL
v.
HOUGHTON
ET UXOR.

tribute his share to the rates of the parish; and thus the poor, from the exercise of this supposed right in the autumn, would be liable to starve in the spring.

[GOULD, J. at considerable length gave his opinion, with reasons, to the effect that judgment ought to be for the defendants.

HEATH, J.,* and WILSON, J., gave their opinions substantially in agreement with that of the Chief Justice, Lord LOUGHBOROUGH.]

Judgment for the plaintiff.

C. P. HILARY TERM.

1788.

[68]

HARRISON v. BULCOCK, AND SIX OTHERS.

(1 H. Bl. 68—72.)

A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not assessable to the land-tax.

TRESPASS for taking the goods of the plaintiff.—Plea, General Issue.—Verdict for the plaintiff, subject to the opinion of the Court on the following case.

The plaintiff at the time when the goods were taken was treasurer of Guy's Hospital, in the parish of St. Thomas, Southwark. By an assessment made on the 19th of May, 1786, he was assessed to the land-tax for the house in which he lived. Five of the defendants were commissioners, and the other two collectors. The plaintiff appealed to the commissioners against the rate, who dismissed his appeal. On his refusing to pay the sum assessed, the goods in question were taken under a warrant of distress.

[69]

The hospital originally consisted of only two squares, built on land demised by the mayor and commonalty of London as

* One observation of Mr. Justice HEATH is quoted by Lord SELBORNE in *Neill v. Duke of Devonshire* (1882), 8 App. Ca. 156:—"It is the wise policy of the law," he says, "not to

construe acts of charity, though continued and repeated for never so many years, in such a manner as to make them the foundation of legal obligations" (1 H. Bl. 60).

governors of St. Thomas's Hospital, to the founder, Thomas Guy, in the year 1720.

By an Act of the 11th of Geo. I. certain persons were incorporated, in pursuance of the will of the founder, by the name of president and governors of the hospital founded by Thomas Guy.

To whom being incorporated, the mayor and commonalty of London, as governors of St. Thomas's Hospital demised another piece of land, in the parish of St. Thomas, Southwark, on which many houses, &c. stood, but which the said president and governors, by virtue of the powers vested in them by the Act of Parliament and the will of the founder, pulled down, and in their place built another square in addition to, and communicating with the hospital, in which square the plaintiff's house is situated.

No part of the ground on which the hospital now stands was ever part of the site of St. Thomas's Hospital, but this ground before the two demises of it to the founder and governors of Guy's Hospital, was covered with houses let to different persons, and in the year 1698, and from thence to the building of Guy's Hospital, was assessed to the land-tax.

The house in which the plaintiff lived has been constantly occupied by the treasurer for the time being, for whose sole use it was erected.

The plaintiff paid no rent for it, but occupied it as incident to his office.

Bond, Serjt., on behalf of the plaintiff, contended, that he was exempted from payment of the land-tax, in respect of the site of the hospital and the buildings within the limits of it, being stated to live in a building within those limits. He paid no rent for his house, but held it as incident to his office. The treasurer is the servant of the hospital, and as such protected by the exception given to the hospital. The protection given to charities is very ancient. It is to be found in the old Subsidy Acts, and was preserved in the first land-tax bill of William the Third.—The Subsidy Act of the 1st Eliz.* contains a general exemption of hospital property, for it declares that it shall not extend to the goods and lands of any hospital, &c. used for the

1788.

HARRISON
v.
BULCOCK.

* Runnington's Appendix, vol. x. p. 163, s. 34.

1788.
HARRISON
v.
BULCOCK.
[70]

sustentation and relief of the poor, &c. and the 4th of W. & M. c. 1, s. 25, contains a protection to the site of hospitals, which has been inserted in all the land-tax bills which have been passed since the Revolution, with the material addition of "any of the buildings within the walls or limits of the hospital." From hence it is clear, that the Legislature has been anxious to extend the exemption to the appendages of an hospital, which are inhabited either by the objects of the charity or the servants of it. The site of a building means the land upon which the building and all its dependencies and offices are situated. The stat. 32 H. VIII. c. 20, mentions the site of monasteries, and under that description not only the land upon which the walls of a monastery were built, but the garden, orchard, and all the appurtenances may at this day be exempted from tithes. But lest the term might be ambiguous, the Legislature expressly added the words "any of the buildings within the walls or limits of the said hospitals."* Now what are these buildings? Certainly such as are necessary to the hospital. The necessity of the superintendence of the chief officers is as obvious as that of the service of the inferior agents, and such officers must have a residence suitable to their rank. If the treasurer, chaplain, or physician be assessable, so are the porters, gardener, and other servants who live within the hospital. They have all an interest of the same nature, differing only in their respective emoluments, which are proportioned to their several employments. They are all servants. By taxing either, the benevolent intentions of Parliament would be defeated; for the reason of the exemption is a regard to the public funds of the hospital, which would be lessened by a tax laid upon the servants, who would look to the public stock for repayment. The funds of hospitals are but barely equal to the charitable purposes of their institution. If a tax be laid on persons who will be reimbursed out of the public funds of a charity, the charity itself is taxed.

The land-tax in this instance bears no analogy to other taxes. Under the window-tax the plaintiff would be assessable because the Act is positive that "all dwelling-houses shall pay." The poor's rate is a tax proportioned by a general estimate of the

* Land-tax Act, 27 Geo. III. s. 25.

property of the rateable occupier. The plaintiff could not have any claim in such case on the treasury of the hospital for reimbursement. But when charged with the land-tax, he is charged only with respect to his house.

It is objected, that the part of the hospital buildings in which the plaintiff resides, stands upon land which once paid the land-tax; and that as a certain fixed sum must be raised by the parish, the *quota* to be paid by each individual will be increased, if any part which has before borne a share of the burthen should be discharged. Now it is true that a certain sum must be paid by every district; but whether that sum is to be collected from a greater or less number of individuals, depends upon the state of property within the district. This makes the principal difference between the ancient subsidy and the modern land-tax. In the case of *The King v. The Occupiers of St. Luke's Hospital*, 2 Burr. 1064, Lord MANSFIELD says "Whether property is chargeable by a rate or other payment, depends upon the will of the proprietor. The owner of a house may if he pleases, pull it down, and convert it into a toft: the owner of lands may suffer them to lie barren and unoccupied. Tithes and the rights of them vary, according to the different species of the produce of the land, yet the landholder may sow it, or plant it, or use it, in the manner he likes best, or even not at all, if he so chooses." As the parish then is to pay collectively a certain sum, the question in the present case is not between the hospital and the public, but between the hospital and the parish; the same contribution will be made to the public revenue, from whatever source that contribution may arise.

Le Blanc, Serjt., for the defendants, argued:

1st, That the Court had no jurisdiction in the present case, the twentieth section of the Act having made the appeal to the commissioners final.—2ndly, That the exemption was meant by the Legislature to protect only the buildings of hospitals at that time appropriated to the immediate objects of charity, and not to extend either to subsequent acquisitions, or to those buildings which were erected for the accommodation of the officers. This rule has obtained with regard to the poor's rates and window-

1788.

HARRISON

BULCOCK.

[71]

1788.
HARRISON
v.
BULCOCK.

[72]

tax. Buildings inhabited by the distressed objects of a poor's rate are not assessed, like those which are occupied by the necessary officers. There is no reason why the plaintiff should be protected from the land-tax when he is liable to the poor's rate and window-tax. In *The King v. Gardner*,* it is expressly said that the master of Catherine Hall, was rated for his garden, upon which houses had formerly stood, and which had been purchased by the college and added to their lands.

The hospital could not be injured, if the plaintiff were assessed, for he could have no claim to call upon the funds of the charity for reimbursement. The parish might be essentially injured, if the exemption claimed should be allowed, and the hospital should go on to increase the buildings belonging to it, as the number of persons to pay the sum required would be continually lessened. But whether the dispute be between the parish and the plaintiff, or the revenue and the plaintiff, the law is the same.

The opinion of the Court was thus delivered by :

LORD LOUGHBOROUGH :

This being a building within the limits of the hospital, not let, nor yielding any profit, but in the occupation of a necessary officer, comes under the exemption of the Act. That there might be no ambiguity in the word site, the Legislature goes on to say "any of the buildings within the walls or limits of the said colleges, halls, and hospitals." None of the buildings therefore within those limits are chargeable, unless they are charged as such, in some other clause of the Act, and no such clause is to be found.

The tax must be either on the owner or tenant of the hospital, but the plaintiff is neither owner nor tenant.

The objection to the jurisdiction of the Court is of no weight, the appeal to the commissioners being alone final, when the question arises, as to the *quantum* of the tax, and whether lands belonging to hospitals, &c. were assessed as such in the 4th year of William & Mary, or have been purchased since that time.

Judgment for the plaintiff.†

* Cowp. 79.

† See *All Souls College v. Coster*,
3 Bos. & Pul. 635; *Colchester v.*

Keowney (1866) L. R. 1 Ex. 363, 379,
35 L. J. Ex. 204.

C. P. MICHAELMAS TERM.

SAUNDERSON *v.* MARR.

(1 H. Bl. 75.)

1788.
Nov. 17.

[75]

A warrant of attorney given by an infant is absolutely void, and the Court will not confirm it, though the infant appear to have given it (knowing that it was not valid) for the purpose of collusion.

THE defendant being an infant, joined with his brother in giving a warrant of attorney to the plaintiff, to confess a judgment, which was accordingly entered up, and the defendant taken in execution. In order to procure his discharge, he alone gave a second warrant of attorney, on which judgment was again entered, and he again taken in execution. On this, a rule was granted to shew cause, why the last judgment should not be set aside, and the warrant of attorney cancelled, on the ground that the defendant was an infant at the time of giving it.

Marshall, Serjt., shewed for cause, a declaration of the defendant, when he gave the second warrant of attorney, that he would take no advantage of his infancy, a promise to pay the debt, and some circumstances of collusion between him and his brother. This application, *Marshall* said, was made to the equitable jurisdiction of the Court; and in equity, the acts of an infant are often confirmed; such as an agreement to settle an estate, and the like.

But the Court said :

Such acts of an infant as are only voidable, are allowed in equity to be confirmed, but not such as are actually void. A warrant of attorney is of the latter description, which the Court cannot make good, though there appear circumstances of fraud on the part of the infant.

Rule absolute without costs.

1788.
Nov. 22.

[81]

WILLIAMS v. MILLINGTON.

(1 H. BL. 81—86.)

An auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such third person, and the goods were known to be his property.

THE plaintiff was an auctioneer, and employed by one Crown to sell his goods by auction. The sale was at the house of Crown, and the goods were known to be his property. The defendant bought goods to the amount of 7*l.* 9*s.* 6*d.* and after packing them in a cart, which he had prepared ready at the door, paid the plaintiff 2*l.* 4*s.* 6*d.* in cash, and put a receipt into his hand, for five guineas as for a debt due from Crown to the defendant. While the plaintiff was hesitating about the propriety of taking the receipt in payment, the defendant drove off the cart with the goods. Afterwards the plaintiff being called upon by Crown, paid to him (who refused to accept the receipt) the whole sum for which the goods were sold to the defendant, and brought this action to recover the five guineas, in lieu of which the receipt was offered.

The declaration was for goods sold and delivered, with the usual money counts.

Plea, general issue.—Verdict for the plaintiff.

A rule was granted to shew cause, why this verdict should not be set aside, and a nonsuit entered.

[83] [In support of which rule, *Adair*, Serjt., and *Marshall*, Serjt., argued, that as the goods in question were known to be the property of Crown, and sold as such, and as the owner might have brought the action himself, the plaintiff was not entitled to bring an action for goods sold and delivered. Nor could he maintain the count for money paid. When Crown refused to take the defendant's receipt in payment, the plaintiff knew the subject of contention between them, and therefore, as he was not bound to pay more money than he had actually received, he elected, by paying the amount of the receipt, to deprive the defendant of the benefit of his claim on Crown.

Bond, Serjt., argued against the rule. The only question was, whether the plaintiff could maintain an action for goods sold and delivered, and money paid? An auctioneer is not a mere servant, but a special bailee, and has a sufficient property in goods which he is to sell, to maintain trover, and rebut a prosecution for felony. The plaintiff also is entitled to recover the money which he has wrongfully paid on a count for money had and received. *Moses v. Mackfarlane*, 2 Burr. 1005.]

1788.
WILLIAMS
v.
MILLINGTON.

[84]

Adair replied, that the only question was, whether a special property in goods was sufficient to support an action founded on contract. He admitted, that in cases where an injury was done, an action on the tort might be maintained. He also admitted, that where the auctioneer was the only ostensible owner, there perhaps he might bring an action on the contract of sale; as in the case of the West India merchant, where the real owner was unknown. But in the present case, as the goods were sold on the premises of the owner, and as it was publicly declared, that they were his property, the plaintiff could not make a contract in his own name. The mode of sale made the whole difference. The case of *Simon v. Metivier*,* is an authority to shew that an auctioneer is only the channel through which the vendor contracts with the vendee, and that being an agent for both parties, he cannot have a sufficient interest in the goods to maintain this action.

LORD LOUGHBOROUGH :

This case arises on circumstances which do not often happen, the defendant having practised a trick upon the plaintiff by driving off the goods in a cart, and at the same time holding out the money in sight, together with the paper containing a receipt for the debt due from Crown the owner. Though the defendant shall not be suffered to avail himself of such contract, yet I entertain no sort of doubt on the general question being extremely clear, that an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody like a servant or shopman. There is no difference,

* 3 Bur. 1921, more accurately reported in B. N. P. 280, 1 W. Bl. 599, S. C.

1788.
 WILLIAMS
 v.
 MILLINGTON.
 [*85]

whether the sale be on the *premises of the owner, or in a public auction room, for on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest: but an auctioneer has also a special property in him, with a lien for the charges of the sale,† the commission, and the auction duty, which he is bound to pay. In the common course of auctions, there is no delivery without actual payment, if it be otherwise, the auctioneer gives credit to the vendee, entirely at his own risk. Though he is like a factor therefore in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompense of a commission *del credere*. It is not a true position, that two persons cannot bring separate actions for the same cause: the carrier and the owner of goods may each bring actions on a tort; the factor and owner may each have actions on a contract. I am therefore, upon the whole, decidedly of opinion that this action may well be maintained.

[GOULD, J. and HEATH, J. were of the same opinion.]

WILSON, J. was inclined to think this verdict properly found, but doubted whether the plaintiff, though having a special property, had the right to dispose of the absolute property, upon which the action for goods sold and delivered was founded.]

Rule discharged.

† The above passage is cited by Mellor, J. in his judgment in *Wolfe v. Horne* (1877) 2 Q. B. D. 355, at p. 358, 46 L. J. Q. B. 534. The principle is cited and followed by

Fry, J. in *Davis v. Artington* (1880) 49 L. J. Ch. 609, 610, and by Williams, J. in *Wood v. Baxter* (1883) 49 L. T. 45, 47.—R. C.

LUSHINGTON v. WALLER.

(1 H. BL. 94—95.)

1788.
Nov. 28.

[94]

Where judgment has not been entered within a year and a day, on a warrant of attorney given with a post-obit bond, and the obligee does not apply to the court for leave to enter it till after the death of the person on whose death it is payable, the Court will not grant leave without a rule to shew cause. A post-obit bond is a security of a doubtful nature.

ADAIR, Serjt., moved to enter up judgment on a warrant of attorney, on an affidavit stating that a bond for 1,800*l.* was given by the defendant to the plaintiff in the year 1780, conditioned for the payment of 900*l.* (in consideration of 400*l.* advanced at the time of the execution of it) on the death of the *defendant's father, in case the defendant should survive, together with the warrant; that the father died in September last, and the son was still living. But

[*95]

The Court said, that in common cases, where judgment has not been entered on a warrant of attorney within a year and a day from the date, it was necessary to apply to the Court for leave to enter it; as this was a *post-obit* bond, a security of a questionable nature, which had been often disputed with success, leave to enter up judgment ought not to be granted without a rule to shew cause. If judgment is entered immediately on giving the warrant, or within a year and a day after, transactions of this sort may probably be brought to the knowledge of the family of the obligor, and a guard raised against fraud and imposition. But if the obligee waits till the death of the father or relation, the Court will prevent his having immediate execution, by which he might force the obligor to submit to such terms as he should think proper to impose, and will require him to give due notice of his intention.

Adair, on hearing this opinion, took nothing by his motion.

C. P. HILARY TERM.

1789.
Jan. 24.
 [97]

ROE, ON THE DEMISE OF JORDAN, *v.* WARD.

(1 H. Bl. 97—100.)

Tenant for life makes a lease for years, to commence on a certain day, and dies (before the expiration of the lease) in the middle of a year. The remainder-man receives rent from the lessee (who continues in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease. This is evidence, from which the Court will presume an agreement between the remainder-man and the lessee, that the lessee should continue to hold (as a yearly tenant) from the day, and according to the terms of the original demise, so that notice to quit ending on that day is proper.*

EJECTMENT for a messuage, &c. John Jordan was tenant for life, remainder to his son the lessor of the plaintiff for life, remainders over. John Jordan, the father, on the 22nd of June, 1785, made a lease of the premises by indenture, to the defendant for twenty-one years, to commence from old Lady-day, which was the 5th of April then last; on which day the defendant had entered. On the 30th of September, 1785, John Jordan, the father died; on whose death, the estate came to the lessor of the plaintiff, his son. The defendant continued in possession, and paid rent to the lessor of the plaintiff, after the death of his father, for two years together, on Old Lady-day and Old Michaelmas-day. Before old Michaelmas-day, 1787, the lessor of the plaintiff gave the defendant notice to quit on Old Lady-day the 5th of April then next; and on his refusing to quit brought this action.

[98] An objection was made at the trial, that the notice to quit on the 5th of April was bad; that it ought to have been on the 30th of September, the end of the year, dated from the death of John Jordan the father; all the defendant's interest derived from the lease having ceased on that event, as John Jordan, the father, had no power to make a lease to endure beyond his own life.

Mr. Justice Ashhurst, who tried the cause, left it to the jury, whether they would not presume a new agreement between the

* The principle is applied in *Kelly* 681, 684; 43 L. J. C. P. 320.—R. C. *v. Patterson* (1874) L. R. 9 C. P.

lessor of the plaintiff and the defendant, that the defendant should continue to hold according to the terms of the original lease ; as the lessor of the plaintiff had received rent from him during two years, after the death of John Jordan, the father, on the original days of payment ; namely, Old Michaelmas and Old Lady-day ; and if so, the notice to quit was proper. But a verdict was found for the defendant.

1789.

ROE
v.
WARD.

In Trinity Term last, a rule was granted to shew cause, why this verdict should not be set aside, and a new trial granted.

Against which, *Lawrence*, Serjt., now shewed cause. He argued, that as the lease was made by a tenant for life, at his death, all the interest of the lessee in the premises must cease : at that time, he was either a trespasser, or he still continued to be tenant. But he was clearly not a trespasser, and as there was no express agreement as to the term for which he was to hold over ; and as it is now a settled point of law that there can be no such thing as a tenancy at will, he was tenant from year to year. If so, as during the tenancy for life of the father, there could be no contract implied between the lessor of the plaintiff and the defendant ; the year must have commenced at the death of the father ; namely, on the 30th of September, and on that day the notice to quit ought to have ended.

Le Blanc, Serjt., in support of the rule, contended, that though perhaps it might have been presumed that the defendant's interest began from the 30th of September, if no rent had been paid on the 5th of April, yet, as the rent was in fact paid on the 5th of April during two years ; such a presumption was totally destroyed. If the interest of the defendant had in truth commenced on the 30th of September, on that day the rent would have been paid : but it appeared to be otherwise from the judge's report. The law draws a conclusion, that a tenant holds from the day on which he pays rent. If the lessor of the plaintiff had given notice to quit on the 30th of September, he would have been nonsuited, since he would have been estopped, by having accepted rent on the 5th of April for two years together, from saying, that the defendant's term began on any other day. The defendant then ought also to be estopped, by

[99]

1789.
ROE
v.
WARD.

his own act, having paid rent on the 5th of April during the same period of two years. The notice to quit therefore was regular, and the verdict wrong.

LORD LOUGHBOROUGH :

The jury found a wrong verdict in this case. The notice to quit on the 5th of April was proper, as payment of the rent had been made on that day. It was also fair and just in the lessor of the plaintiff, to give the tenant notice to quit when his year ended, that the course of his husbandry might not be disturbed.

HEATH, J. :

The defendant was tenant at sufferance, on the death of the tenant for life, and the rent being paid on the 5th of April, was evidence of an agreement to hold from that day.

WILSON, J. :

As there was no express agreement between the lessor of the plaintiff and the defendant, relating to the premises, given in evidence, we must collect what their agreement was, from something done by them. The payment of rent by one, and the acceptance of it by the other, on the same day on which the defendant originally entered, was sufficient evidence of a relation back between them ; and though the indenture itself was made on the 22nd of June, it related back to the 5th of April. Although the title of the defendant under the indenture, ended on the 30th of September, yet the payment of rent on the 5th of April was evidence of an agreement that he should continue to hold in the same manner as he did by the indenture ; insomuch, that if in the lease, there had been covenants for particular modes of husbandry, and the defendant after the death of the tenant for life, had neglected to perform them, the lessor of the plaintiff might have maintained an action on the case against him, stated the covenants, and then averred an agreement to perform them, according to the terms of the original lease ; of which agreement the continuing to pay rent on the 5th of April, for two years together, would have been good evidence.

CHINNERY *v.* BLACKBURNE.

K. B. EAST. TERM, 1784.

(1 H. BL. 117—118, n.)

1784.

[117]

A mortgagee of a ship who takes possession after the voyage has been completed and the cargo delivered has no claim upon the freight; nor is he liable for necessaries supplied to the ship for that voyage.*

GENERAL *indebitatus assumpsit* for freight of goods.—Plea, general issue.—Verdict for the plaintiff, subject to the opinion of the Court on a case which stated, that by an indenture of assignment dated January 4, 1783, Robert Merryfield, in consideration of 1,166*l.* 18*s.* which he owed to the plaintiff, assigned to her the ship B. &c. in which indenture there was a covenant from the plaintiff to re-assign the said ship, &c. to Merryfield, on payment of 1,166*l.* with lawful interest, on or before the 10th of November then next ensuing; that at the time of the execution of the deed, the ship was in the River Thames, and afterwards sailed to Portsmouth, and continued there till the middle of March following, in the possession, and under the command of A. B., and that the plaintiff did not then take possession: that Merryfield navigated, victualled, and manned the ship, as owner thereof, at his own expense and risk, both from England to Antigua, and on her return from thence: that Merryfield at Antigua, gave the command of her to Captain Drysdale, and sent her to England, with orders to the captain to address himself to Messrs. Dunlop, of London, merchants, who were to sell her according to the directions contained in a letter, in which letter Merryfield also said, “Mrs. Chinnery has a demand against me for near 1,200*l.* sterling, which I hope to remit shortly to you, or Mrs. Merryfield, so as to pay her;” that Messrs. Dunlop being applied to as consignees, lent two sums of 50*l.* to Captain Drysdale, declaring they should consider him as reponsible, in case they should not receive the same by freight, &c. and that they afterwards received the money from Drysdale: that the ship completed the delivery of the cargo, on the 27th of September, 1783; that the plaintiff

* See now Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 70). Cases shewing the right of the mortgagee to the freight where possession

is taken *before* it has become due are *Brown v. Tanner* (1868) L. R. 3 Ch. 597; and *Rusden v. Pope* (1868) L. R. 3 Ex. 269.—R. C.

1784.
CHINNERY
v.
BLACK-
BURNIE.

took possession on the 29th of September following, immediately on receiving information of her arrival in the Thames; that the defendant had goods from Antigua on board, the freight of which amounted to 76*l.* 9*s.* 11*d.* for the recovery of which the action was brought: that Captain Drysdale paid for lights, custom-house dues, and for clearing the ship, which the plaintiff repaid him, and also paid his and the mariners' wages for the voyage from Antigua, to the amount of 234*l.* 7*s.* 7*d.* after she took possession of the ship; and that the plaintiff afterwards sold the ship by auction for 710*l.* &c.

[118]

Wood for the plaintiff, contended that she was the legal owner of the ship by virtue of the deed, and beneficial owner, having advanced more than the value. A mortgagee of a ship in possession may sue for freight accrued after the mortgage, as a mortgagee of land coming into possession is entitled to the intermediate rents, growing due after the mortgage, though before he takes possession. *Moss v. Gallimore*, Dougl. 266. Freight is as incident to the ownership of a vessel, as rent is to that of land: as the plaintiff pays all his expenses, she is entitled to all gains. This is to be considered, as between mortgagor and mortgagee; though a set-off between the defendant and the mortgagor, or an attachment of the debt in London, might have made a difference, if they had existed.

Chambre, for the defendant:

This is a contract by a third person, not for the benefit of the plaintiff, who cannot therefore recover in her own name. It bears no analogy to rent issuing out of land, which is incident to the reversion. The cause of action arises on a personal contract, not on the ship itself. A mortgagee cannot recover rent received from the mortgagor. Here the mortgagor has been in the enjoyment of the whole, and the cargo was delivered before the mortgagee had any claim. The mortgagee surely cannot bring actions against a vendee of the mortgagor for any supply of goods, &c. There could be here no set-off between the mortgagor and his creditors, if the mortgagee be permitted to bring this action. If the mortgagee takes the benefit of the con-

tracts of the mortgagor, he ought also to be liable for any losses that might happen, which is not contended. If Merryfield had become a bankrupt, his assignees would have been entitled to the freight. The plaintiff paid the wages, &c. merely to get possession of the ship, discharged of any lien there might be upon it.

1784.
CHINNEY
v.
BLACK-
BURN.

LORD MANSFIELD :

The justice of the case struck me forcibly at first, as between the mortgagor and mortgagee : but the mortgagor is no party ; the action is brought after the mortgage, against a person who contracted with the mortgagor. This action must be founded on the idea, that the mortgagor in possession is the servant and agent for the mortgagee, which is not the case. Till the mortgagee takes possession, the mortgagor is owner to all the world ; he bears the expenses, and he is to reap the profits.

ASHHURST, J. :

If the voyage had proved unprofitable, could the mortgagor have recovered against the mortgagee the expense of the outfit ? Yet this must have been the case if the mortgagee were entitled to the profits.

BULLER, J. :

If the mortgagor be considered as agent, he must be so throughout, and then the mortgagee would be answerable for every loss, damage, &c. The payments by the plaintiff were voluntary, to get possession of the ship free from any liens, and are at most but evidence of the mortgagee's possession.

Postea to the defendant.

1789.

Feb. 10.

[120]

ANDERSON *v.* HAYMAN.

(1 H. Bl. 120—122.)

A tradesman delivers goods to A. at the request and credit of B., who says, before the delivery, "I will be bound for the payment of the money as far as 800*l.* or 1,000*l.*" This promise of B. not being in writing, is void by the Statute of Frauds, if it appear that credit was given to A. as well as to B.

THE plaintiff was a woollen draper in London, and employed one Biffin as a rider to receive orders from his customers in the country. The defendant meeting with Biffin at Deal, desired him to write to the plaintiff, requesting him to supply the defendant's son (who traded to the West Indies) with whatever goods he might want, on his, the defendant's credit, and at the same time said, "Use my son well, charge him as low as possible, and I will be bound for the payment of the money, as far as 800*l.* or 1,000*l.*" Biffin accordingly wrote to the plaintiff the following letter, "Mr. Hayman of this town says his son will call on you and leave orders, and he has promised me to see you paid, if it amounts to 1,000*l.*, Mr. William Pitches was also present as a witness.

[121]

"*N. B.* If deal for twelve months' credit, and pay in six or eight months, expects discount in proportion." Soon after, the son received goods from the plaintiff to the amount of 800*l.*, which were delivered to him in consequence of the above-mentioned order from the father. The son was debited in the plaintiff's books, and being applied to for payment, wrote an answer to the plaintiff as follows:

"Your favour of the 27th past has been forwarded to me from Ostend by my clerk, in answer to which, I can only say, that I understood your credit for the goods was twelve months, which was also mentioned by your rider to my father. I shall at this rate, make you remittances for the different parcels, as they come due, and remain, &c.

"THOS. HAYMAN, Jun."

He afterwards became a bankrupt, and this action was brought against the father, to recover the value of the goods.

The declaration contained seven counts: the first was on an

agreement by the defendant to pay, &c. in consideration that the plaintiff would sell the goods to his son; 2nd, *Quantum valebant*; 3rd, Goods sold and delivered to the son at the request of the defendant; 4th, *Quantum meruit*; 5th, Money paid to the use of the defendant; 6th, Goods sold and delivered to the son, on a promise by the defendant to see the plaintiff paid, to the amount of 800*l.*; 7th, Same promise on a *quantum meruit*.

Plea, general issue. Mr. Justice HEATH, who tried the cause, directed the jury to consider, whether the plaintiff gave credit to the defendant alone, or to him together with his son; that in the former case, they should find a verdict for the plaintiff; in the latter, for the defendant; being of opinion, that if any credit was given to the son, the promise of the defendant, not being in writing, was void by the Statute of Frauds. A verdict was found for the defendant.

A rule was obtained to shew cause, why this verdict should not be set aside, and a new trial granted.

Against this rule, *Bond*, Serjt., relied on the case of *Matson v. Wharam*, 2 Term Rep. B. R. 80.*

On behalf of the rule, *Le Blanc* and *Runnington*, Serjts., said that in *Matson v. Wharam* the undertaking was collateral, but here it was direct, the original credit being given to the defendant; and cited the cases of *Birkmyr v. Darnell*, 1 Salk. 27, and *Moubrey v. Cunningham*, mentioned in *Jones v. Cooper*, Cowp. 228.

[122]

But the COURT were clearly of opinion that this promise, not being in writing, was void by the Statute of Frauds, as it appeared from the evidence of the letter of Hayman the younger, that credit was given to him, as well as to the defendant.

Rule discharged.

* R. R. vol. i. p. 429.

1789.
ANDERSON
v.
HAYMAN.

1789.

[124]

FOLLIOTT *v.* OGDEN.

(1 H. BL. 124—136.)

OGDEN *v.* FOLLIOTT.

IN ERROR.

(3 T. R. 726—735, and in H. of L. 4 Br. P. C. 111—133.)

Before the Declaration of Independence, a bond for borrowed money was made by B. in favour of A., both British subjects in America. Subsequently and during the war, the State of New York confiscated the property of A. (then a resident there), as an adherent of the enemy. After the Treaty of Peace, A. brought an action of debt on the bond in the English Court of Common Pleas. Held that he could recover:—By the Common Pleas, on the ground that an act of confiscation by a Foreign State is no bar to a transitory action in an English Court; by the King's Bench, on the ground that the Treaty of Peace did not relate back so as to validate the act of confiscation; which therefore could not, in an English Court, be regarded as having any authority. The judgment of the C. P., so affirmed by the K. B., was again affirmed by the House of Lords.

[THIS was an action of debt on a joint and several bond. It appeared from the pleadings that at the time of making the bond, Oct. 10, 1769, the plaintiff as well as the defendant and the other obligants in the bond, were resident within the territory since become the United States of America; and remained so resident until the 22nd of October, 1779, when laws were passed by their respective States, attainting them as adherents of the enemy, confiscating their respective properties, and vesting their estates in the people of their respective States. The pleadings set forth the Treaty of Peace, of 3rd Sept., 1783, whereby the King of Great Britain acknowledged the United States of America to be free and independent States, and whereby (*inter alia*) it was agreed that the Congress should recommend the legislatures of the respective States to provide for the restitution of all estates which had been confiscated. Upon this an argument was founded that the State Acts of confiscation above mentioned were recognized by this country as valid.

1790.
June 11.

The questions arising on the pleadings having been argued, the following judgment was this day delivered by]

[135]

LORD LOUGHBOROUGH :

It is unnecessary for me to state the pleadings in this case at

length, as the only two material questions arise on the third and fourth pleas. The third plea in substance is, that the plaintiff was attained by the State of New York, that all his estate and effects were confiscated, and forfeited to the people of that State and that in consequence, the bond in question and all the money due upon it was forfeited to and vested in them. Now there is no occasion to enter into a discussion of the matters contained in the replication, rejoinder, sur-rejoinder, or rebutter, for admitting this Act of the State of New York, to be of as full validity as the Act of any independent State, which the defendant contends, and which it certainly was, still it cannot operate as a bar to the plaintiff's demand in this action.* If it were a bar, it must either be in respect of his person, as disabled to sue, or in respect of the subject-matter of the suit. It was admitted in the argument, that by the criminal sentence of attainder of one sovereign, independent State, no personal disability to sue in another was created; but it was contended, that the property of this bond was divested out of the plaintiff by act of the law of that country, to which both he and his property were subject. But if the penal laws of a foreign country do not in themselves import a personal disability to sue in this, neither do they by divesting the property of a person in that country, take away his right of action in England. The subject-matter of this action being a bond, it could only be sued for according to the laws of England relating to bonds; supposing therefore the right of the plaintiff to be gone, that could not be set up in bar of the action, which must be brought in the name of the present plaintiff, whoever might be in possession of the bond, since a chose in action is not assignable at law, and the defendant could not plead that the obligee had assigned it. I would even go farther, and say, a right to recover any other specific property, such as plate or jewels, in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who passes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like; and cannot be affected in

1789.

FOLLIOTT
v.
OGDEN.

* See Lord Kenyon's opinion, *contrd.*, on this part of the case, p. 741, *post.*

1789.
FOLLIOTT
v.
OGDEN.

this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.

[136]

The other question arises on the fourth plea, which states, that the defendant was attainted by the State of New Jersey, that all his estate and effects were confiscated, and vested in the people of that State, and in the first place made liable to the payment of all his debts; that a fund was raised more than sufficient to pay them, to which the plaintiff might and ought to have resorted. This plea has the same tendency with the 3rd, to prevent the plaintiff from recovering; but the whole amount of it is a ground in equity for relief against a creditor, who would make an oppressive use of one security in preference to another; for I perfectly agree with the doctrine of the case of *Wright v. Nutt*, and think that if the plaintiff in this action might have recovered his debt out of the fund appropriated to that purpose in New Jersey, and has wilfully omitted so to do, there would be a good reason for equity to interfere: if he might have recovered the whole, this action might on equitable grounds be entirely stopped; if only a part, equity would relieve *pro tanto*. This is every thing except what it ought to be, and comes as near as it could to a plea of payment; but in a court of law nothing short of actual payment is good. Upon the whole therefore, as the case stands, there is nothing to prevent this Court from giving

Judgment for the plaintiff.

1790.
OGDEN
v.
FOLLIOTT.
In Error.
[3 T. R. 729]

A writ of error having been brought against the above judgment, it was argued before the judges of the King's Bench by

Erskine, for the plaintiff, who contended that the Treaty of Peace had relation to, and ratified, the Declaration of Independence; and that in whatever light the Acts of the State of New York might be considered in this country previous to the Treaty of Peace, yet, inasmuch as the States of America were treated with as independent states, and recognized as such, the Acts passed subsequent to the time of the Declaration of Independence must be taken notice of in the courts of law in this country as

the Acts of a free and sovereign State. The time when the Americans declared themselves independent is the only period to which the Treaty of Peace, acknowledging them to be, and not conferring on them the right of being for the first time, independent States, can have relation. It was so considered by the present Lord Chancellor in *Wright v. Nutt*.† If then the Act of Confiscation, stated in the pleadings, were the act of a sovereign and independent state, this Court will consider it as conclusive in this country. In *Wright v. Nutt*, the LORD CHANCELLOR commenting on an Act of Confiscation by the State of Georgia, said “It may be a question for private speculation whether such *a law made in Georgia was a wise or improvident one, whether a barbarous or civilized institution. But here we must take it as the law of an independent country, and the laws of every country must be equally regarded in courts of justice here, whether in private speculation they are wise or foolish.” This rule is not confined merely to the cases of civil property: it also prevails in questions of prize (which are in their nature penal) in the Courts of Admiralty in the different countries, who universally give credit to each other’s acts. They are considered as binding and conclusive on property, inasmuch as the subject matter of the sentence is within the jurisdiction of the respective courts in which it is condemned. Therefore a sentence of condemnation, as prize, in a foreign Court of Admiralty would be an answer to an action of trover brought in this country to recover a vessel, so condemned. So if a subject of France were attainted there, and his property were granted to another, who were to bring part of it with him into this country, he would not be liable to restore it to the person attainted by force of an action to be brought against him here. These instances shew that the penal laws of one country are taken notice of in the courts of another.

1790.
OGDEN
v.
FOLLIOTT.
In Error.

[*3 T. R.
730]

BULLER, J. :

In questions between a person attainted and a wrong-doer, it is not necessary that the Crown should actually seize the property of the former in order to divest him of it. For though before seizure the person attainted cannot maintain an action against a

† *Vid.* H. Bl. Rep. C. B. 149.

1790.
 OGDEN
 v.
 FOLLIOTT.
 In Error.

[*3 T. B.
 731]

wrong-doer who is in possession of part of his property, yet that arises from the personal disability of the plaintiff in consequence of the attainder; and therefore if such person were afterwards pardoned, I conceive that he might maintain such an action, notwithstanding the Crown did not re-grant him his property. A seizure in fact is not necessary since the statute 33 H. VIII. c. 20, which enacts that the property of persons attainted shall be adjudged in the actual possession of the Crown, without office. And a bond, as well as a chose in possession, is forfeited by the attainder of the obligee: Staund. P. C. 188 a. Then the Act of Confiscation in this case divested the plaintiff of his property in the bond, and disabled him to sue on it in the courts of law in this country as well as in America. A parliamentary attainder here (to which the Act of Confiscation may be assimilated) is at least equal to an assignment under the bankrupt laws: now it cannot be denied but that such an assignment would be an answer to an action brought by the bankrupt himself, *even before the assignees had actually taken possession of the property sued for; on this ground, that the plaintiff has no property in the subject matter of the action. But if this Court will not take notice of the Act of Confiscation in America, neither will the Courts of law in America pay any deference to the judgment of this Court: and then the plaintiff in error may be doubly charged; for the recovery in this action could not be pleaded in bar to an action brought in a court of law in New York on this very action; and the judgment here will give no cause of action to the plaintiff in error to recover his proportion against the co-obligors in America.

Watson, Serjt. *contrà*, was stopped by the Court.

LORD KENYON, Ch. J.:

This question is undoubtedly of considerable moment, inasmuch as it affects an extensive class of persons, and inasmuch as the argument has involved in it the respective rights of the subjects of the different nations: however the ground, on which I am inclined to confirm the judgment given by the court of Common Pleas, seems perfectly clear. And indeed we all considered it so

clear in the last Term† that we did not think it proper that the question should be discussed. Whether or not the report of what passed in the court of Common Pleas in this case be accurate‡ I will not presume to say; but I confess I was induced to think that the word “not” had been omitted in that part of the judgment, where the Acts of the State of New York passed during the war are considered “to be of as full validity as the Act of any independent State.”§ For supposing that the language as reported to have been used by that Court, had in fact been used, and that the case was to be determined on that ground, I should have wished to have heard it once argued in answer to the objection made by the plaintiff in error. If we were to consider the Acts of the province of New York as binding as has been contended, I am at a loss to know why all the property of those persons, which was said to be confiscated, did not pass to the executive power of that State to whom it was said to be forfeited; and why an action might not have been brought in the name of such executive power to enforce the payment of this bond; and how an action could have been brought in the name of the obligee. Having said thus much on the judgment supposed to have been given by the Court of *Common Pleas, I can only say that at present I cannot assent to the reasoning on which that Court gave judgment, though I am of opinion that it should be affirmed on different grounds. The Court of Common Pleas, in giving judgment, stopped at the plea: but the judgment, which I am prepared to give, is founded on the whole of the pleadings, which are in substance these; the plea states that the province of New York in 1779, at the time when the confiscatory law passed, was part of the dependences of Great Britain in open rebellion against the King, and that the plaintiff and the defendant were resident in that State; what became of them afterwards does not appear; and it is not alleged that they were resident in, or subject to the laws of, that State when the treaty of peace was signed. It is not necessary to say what effect that would have had; but thus it stands;

1790.
OGDEN
v.
FOLLIOTT.
In Error.

[*3 T. R.
732]

† Vide *Dudley v. Folliott*, 3 T. R. 584; R. R. vol. i. p. 772.

‡ *Mr. Erskine* said he had heard from the best authority that the re-

port was accurate.

§ Vide *Folliott v. Ogden*, H. BL Rep. C. B. 135, l. 12; p. 737, l. 12, ante.

1790.
 OGDEN
 v.
 FOLLIOTT.
 In Error.

in 1779 that province set about a reform and to assert what is called their rights, but which I, sitting here, am bound to say was an act of rebellion against the sovereign power of the State, and that their act was illegal at that time, whatever confirmation it might afterwards receive there by the subsequent Treaty of Peace. Then, when these parties came into this country before the independence of America was acknowledged, was their property confiscated? Could it have been pleaded here to an action brought at that time that those States had made what they called a law, forfeiting the property of those who adhered to the government of this country? Certainly not. And yet as between these parties they must be understood to be in the same situation now as at that time; for, whatever operation the Treaty of Peace might have on the persons resident in that country, it is impossible to say that it was intended to, or did, give effect to the acts of the assembly by which the property of our own subjects resident here was confiscated. The consequence of the argument for the plaintiff in error would be, that every act done by the loyalists in America previous to the Treaty of Peace was admitted by that treaty to be an act of high treason against the State of New York; but that can never be supported. The plaintiff came into this country subject to all his legal contracts, and armed with all the legal rights, which any other subject had.—It would be enough to stop here: but it has been said that, where the property of a subject of one country is confiscated, and vested in the sovereign State, every other country ought to take notice of the confiscation: but that was not the case; for these persons never were *attainted by any Act of a sovereign State, those Acts were passed by the subjects of this country, who at that time withdrew themselves from the sovereign State, and assumed to themselves a power of making laws. It might equally be said that, if the Isle of Wight, or any town in this country, wished to throw off their allegiance to the King, and to assert what are called the rights of man, and to declare that they would no longer continue subjects of his government, they would immediately become an independent State. I am therefore most clearly of opinion that the Act of Confiscation which passed in 1779 cannot be considered in this country as competent to transfer the property

[*3 T. R.
 733]

of Folliott to any person whomsoever ; and consequently that the right of action, which accompanied him when he came into this country, is not divested out of him. We are pressed at the close of the argument with the peculiar circumstances of the plaintiff in error, who, it was said, could have no remedy against his co-obligors in America, notwithstanding the judgment here, and who might even be sued again on this very bond in that country ; but that argument ought not to guide our judgment ; for I have always understood it to be clear law that all judicial acts done in one country over the property of the subjects within their jurisdiction are conclusive on the property of those parties in any other country.

1790.
OGDEN
v.
FOLLIOTT.
In Error.

ASHHURST, J. :

It is sufficient for me to say that I concur in opinion with Lord KENYON. These parties came here as subjects of this country before the Treaty of Peace ; and therefore any acts done by the State of New York at that time could not alter the rights of our own subjects. The plaintiff and the defendant came into this country in the character of creditor and debtor ; and their situation as individuals was not affected by the Acts of Confiscation.

BULLER, J. :

A very few words are sufficient to decide the present case. It is a general principle, that the penal laws of one country cannot be taken notice of in another. Then apply that principle to the present case. This is an action on a bond, to which the defendant has pleaded that by the penal laws of another country the property of the plaintiff in the bond has been divested out of him : but this Court cannot take notice of that defence ; and then all the pleadings are a nullity, and consequently the action remains unanswered. That is as much as is necessary to say in the determination of this particular case. Another question, however, having arisen in the argument, whether or not it was necessary that there should have been a *seizure on the part of the State of New York, in order to divest the property out of the plaintiff, I will give my opinion upon it. The answer given at

[*3 T. R.
734]

1790.
 OGDEN
 v.
 FOLLIOTT.
 In Error.

the bar from the statute 33 Hen. VIII. c. 20, that in this country the property of persons attainted is vested in the Crown without office, is not conclusive; and I am still of opinion that a seizure is necessary. The effect of that Act of Parliament is only to avoid the necessity of an office. The case of *Stone v. Newman** shews what construction has been put on the statute. There, Sir T. Wyat being tenant in tail male, with the reversion in the King, enfeoffed G. Moulton in fee; Sir T. Wyat had issue G. Wyat, who had issue Sir F. Wyat, under whom the defendant claimed. But Sir T. Wyat was attainted, and the attainder was confirmed by a special Act of Parliament,† enacting that he should forfeit all his lands, &c. and that they should be vested in the Queen without office (nearly in the same words as are used in the statute of Henry VIII.). That case was very elaborately discussed by all the Judges; and in answer to an exception‡ taken to the pleadings that no seisin was alleged in the Queen, and that then Sir F. Wyat's title was good until seisin, for he had the first possession, it was adjudged, "that it appeared that, after the attainder, the Queen being entitled by the general Act of Parliament, 33 H. VIII. and by the special Act, 1 & 2 P. & M. it was in the Queen without office; and that the Queen granted it unto him under whom the plaintiff claimed, who entered, and was seised, until Sir F. Wyat entered; so he had the priority of possession and right;" wherefore the exception was disallowed. It was so material in that case to give an answer to the objection, that the Court answered it by the fact of the case, namely, that there was an actual seizure. The instance put at the bar of an assignment by the commissioners of a bankrupt, which divests the property of the bankrupt without actual seizure, bears no analogy to this case. For there is a wide distinction between questions of property between one subject and another, and questions arising on the law of attainder between the Crown and a subject. And I shall never agree in extending the same rule of construction, which obtains in the former instance, to the latter case. It would be attended with peculiarly serious consequences in the present state of Europe; since then the property of foreigners, who are daily resorting for refuge to this country from

* Cro. Car. 427.

† 1 & 2 P. & M. c. 3.

‡ Cro. Car. 460.

confiscations at home, would not be protected against the designs of artful men who could gain possession of it by any means.

1790.
OGDEN
v.
FOLLIOTT.
In Error.

GROSE, J. :

[3 T. R. 735]

I continue of the same opinion, which I entertained in the case of *Dudley v. Folliott*; and I most perfectly concur with the Court on this occasion. It has been correctly stated by my brother BULLER, that the penal laws of one country cannot affect the laws and rights of citizens of another. Then if we were to determine that the plaintiff should not recover on this bond, we must say that the Treaty of Independence was retrospective, and that it had the effect of declaring that the property of the subjects of America resident in this country was forfeited by an Act, which at the time it passed was considered as mere waste paper, or, if it were of any avail, was an act of treason. It has been objected against the plaintiff's recovering here that the defendant will not recover in America against the co-obligor, because the States of America will pay no regard to our judgments; and yet the argument is that we must pay a deference to the Acts of those persons, whom we must consider to have been in a state of rebellion at the time when they were passed. Now if it be true that the States of America will not take notice of the judgments given in our courts of law, we should be doing great injustice to the present plaintiff to say that we must consider ourselves bound by their Acts of Confiscation.

Judgment affirmed.

On this date the judgment of the King's Bench having been brought, on error, before the House of Lords, the question was finally considered.

1792.
Feb. 25.

The arguments for the plaintiff in error were as follows :

First, That the act of attainder against the defendant in error, and the forfeiture of his estate, passed by the Legislature of the State of New York, on the 22nd of October, 1779, is an act of investiture of the defendant in error's property in the people of that State, the same expressly declaring, "that all the estate

[4 Br. P. C.
129]

1792.
 OGDEN
 v.
 FOLLIOTT.
 In H. of L.

both real and personal, held or claimed by the defendant in error (by name) whether in possession, reversion or remainder within that State, on the day of passing that Act, shall be, and thereby is declared to be forfeited to and vested in the people of that State."

Second, It is also humbly submitted, that the defendant in error, and the several obligors in the bond, prosecuted in this suit, named, were before, at the time of, and after passing said confiscatory law, residents in the said State of New York, and the defendant in error had before, and at the time of passing said law, the said bond in his possession, within the jurisdiction of that State; and that it did not appear by the record or otherwise, but that the defendant in error had remained from the time of passing said law, and at the time of the appeal did remain a citizen of said State of New York; or that the defendant in error came into this country before the signing of the Treaty of Peace.

Third, That the possession of goods and chattels is by law vested in the sovereign, on attainders, outlawries, and forfeitures without office found or actual seizing.

Fourth, That bonds and the debts due thereon, are forfeitable on attainders, outlawries, &c. and are vested in the sovereign in like manner as other goods and chattels are.

Fifth, That the plea of attainder and forfeiture is a good bar to an action brought by the obligee on a bond or other chose in action.

Sixth, That on forfeitures, the king or his assigns, in whom the property of the debt due on an obligation is vested, have sole right to support an action for the recovery thereof, and none others; and therefore also that the State of New York hath the sole right to sue upon this bond.

[4 Br. P. C.
 130]

Seventh, That the courts of justice here do regard the subsisting laws and adjudications of foreign States in force there, and determine according to those laws and adjudications, both in civil and criminal cases, when they relate to matters within the jurisdiction of the foreign State at the time of passing the same, without examining into their propriety or impropriety; but take and regard them as laws and adjudications passed agreeable to the constitution of the country where made, and deter-

mine conformably thereto. If, therefore, the courts of New York, governed in the constitution of their own laws of confiscation by the law of nations, would necessarily adjudge this property to belong to the people of that State—the courts in England ought also to hold the property to be vested in that people.

Eighth, It was urged that the people of the United States, having on the 4th of July, 1776, declared themselves separated from the sovereignty and government of Great Britain, and declared themselves free, sovereign, and independent states, distinct from all others; and treaties of peace having been afterwards made with them as such, humbly conceived, that the opinion of the Court of Common Pleas was agreeable to the laws of nations, and that the judgment of the King's Bench is not so; and although before such treaties of peace, the Act of Confiscation by the State of New York, might have been held as an absolute nullity in this country, yet after those treaties had been entered into, it appears to be clearly conformable to the laws of nations, that the Act should be considered as of force from its date, and the State that made it, as independent from the time it declared itself to be so; and therefore, that the defendant in error could not sue effectually upon this bond in the courts of this country, at the time he brought the action, though it should be admitted, that he might have sued with effect before this country acknowledged the independence of New York.

Ninth, That the definitive Treaty of Peace, of the 3rd of Sept. 1783, made between his Britannic Majesty and the United States of America, (who only had the right of fixing the terms inviolably to be observed by both States) did accordingly in its terms, manifestly admit and recognize the said United States, as pre-existing, sovereign, and independent States; and that they had before that time exercised, and then did exercise the powers of government; and therefore that their prior acts of legislation, as well penal or confiscatory, as of any other nature, must have been considered as in force from the time of passing them, and to continue in force until repealed by the recommendation of congress, or the voluntary acts of the respective Legislatures of the States.

Tenth, That the bond and debt being for those and other reasons to be judicially considered by the court, at the time at

1792.
 OGDEN
 v.
 FOLLIOTT.
 In H. of L.

1792.

OGDEN

v.

FOLLIOTT.

In H. of L.

[*4 Br. P. C.
131]

which *the suit was commenced, as having been at all times after the separation, *de facto*, of the countries, vested in the State of New York, no act of the defendant in error, or of any other person, but the act of the said State only, done after the separation *de facto*, of the two countries, though such separation, *de facto*, was not originally acknowledged to be lawful, could be judicially held sufficient to bar the State of New York from claiming, *de jure*, the property in this bond. If, therefore, it had appeared upon the record, that the defendant in error had withdrawn himself from the State of New York, and had come into this country, yet, regard being had to the date of the commencement of his suit, judgment ought to have been given for the plaintiff in error; and the courts of law both of Great Britain and New York ought, at the time of the commencement of this suit, to regard this bond as the property of the State of New York at all times, from the date of the Act of Confiscation.

Eleventh, They concluded with asserting that a judgment given here for the defendant in error, and a recovery had of the debt from the plaintiff in error, would not be a bar to a suit brought by the State of New York in any of the United States, against the plaintiff in error, his executors or administrators, or against Lewis and Richard Morris, two of the obligors in said bond named, and now residents in the State of New York, and the payment of the debt would, contrary to common justice, be twice compelled; once to the defendant in error, and a second time to the State of New York. And that judgment here for the defendant in error, and the recovery of the debt from the plaintiff in error, would not be a sufficient ground for the plaintiff in error to recover, at least in the State of New York, against his co-obligors Lewis and Richard Morris, whose security he was; nor, as they apprehended, could the plaintiff in error, if he had been a principal in the bond, and not a surety, have protected himself by reason of the judgment here, against a demand of his co-obligors upon him for contribution, if they should be obliged to pay to the State of New York; whose property, according to the principles of the laws of nations applied to all the transactions between Great Britain and America, this bond, at the time of bringing the action, must be deemed to have been, from

the date of the act of that State confiscating the defendant's property.

1792.

OGDEN

c.

FOLLIOTT.

In H. of L.

On the other side *T. Lawrence* and *J. Wilson*, for the defendant in error, contended that the judgment should be affirmed.

1. Because no assumed Act of legislation by the colonies of North America, while in a state of rebellion against his majesty, can legally affect the rights of any subject of this realm. By the Treaty of Peace, those colonies acquired in future the power of making laws obligatory in all cases in which the laws of independent States are binding, in consequence of their becoming such by that treaty; but no effect was thereby given to the Acts they had before passed to confiscate the property of those who had persevered in their loyalty and allegiance. [4 Br. P. C. 132]

[4 Br. P. C. 133]

2. Because, were it to be admitted, that what is insisted on in the third plea as a law of the State of New York, is of as full force as the laws of a sovereign, independent State, yet as it was intended to operate as a penal law, and to inflict a forfeiture on the defendant in error for a supposed crime committed by him, it furnishes no defence to the action, inasmuch as the allowing such defence would be, in effect, carrying into execution the criminal laws of a foreign State.

3. Because there is not anything stated by the plaintiff in error in his fourth and fifth pleas, from whence there can be inferred any legal obligation on the defendant in error to resort to any particular fund for the payment of his debts, in prejudice of the right which by law vested in him on the execution of the bond in question of proceeding for the recovery of the money secured thereby, either against the person or the general property of his debtor.

It was ordered and adjudged, that the judgment given in the Court of King's Bench, affirming a judgment of the Court of Common Pleas, be affirmed.

1789.
Feb. 12.

[158]

SHIELLS AND THORNE, ASSIGNEES OF GOODWIN,
A BANKRUPT, v. BLACKBURNE.

(1 H. BL. 158—162.)

A. a general merchant undertakes voluntarily and without reward, to enter a parcel of goods of B., together with a parcel of his own of the same sort, at the custom-house for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. A. (having taken the same care of the goods of B. as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken) is not liable to an action for the loss occasioned to B.

THE material facts of this case were as follow. The defendant who was a general merchant, in London, having received orders from his correspondent in Madeira to send thither a quantity of leather cut out for shoes and boots, employed Goodwin the bankrupt, who was a shoemaker, to execute the order. Goodwin accordingly prepared the leather for the defendant, packed it in a case for exportation, and at the same time prepared another parcel of the same kind of leather, on his own account, which he packed in a separate case, to be sent to Madeira on a venture, requesting the recommendation of the defendant to his correspondents in the sale of it. The two cases were sent to the defendant's house, with bills of parcels, and he, in order to save the expense and trouble of a separate entry at the custom-house, voluntarily and without any compensation, by agreement with Goodwin, made one entry of both the cases, but did it under the denomination of wrought leather, instead of dressed leather, which it ought to have been. In consequence of this mistake in the entry, the two cases were seized, and this action was brought by the assignees of Goodwin to recover the value of the leather, which he had prepared to export on his own account. The declaration stated, that the bankrupt before his bankruptcy was possessed of a quantity of leather, which he *designed to export to the island of Madeira, for which purpose it was necessary that a proper entry of it should be made at the custom-house; that the defendant in consideration that the bankrupt would permit him to enter the said leather at the custom-house, undertook to enter it under a right denomination; that the bankrupt confid-

[*159]

ing in the undertaking of the defendant, did permit him to enter it at the custom-house for exportation: that the defendant did not enter it under a right denomination, but, on the contrary, made an entry of it under a wrong denomination, of wrought leather, in order improperly to obtain a bounty* thereon; by means of which wrong entry, the leather became liable to be seized, and was seized and forfeited to the King. 2nd. Count goods sold and delivered. 3rd. *Quantum meruit*. Plea general issue, verdict for the plaintiff.

A rule was obtained to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the defendant not professing the business of entering goods at the custom-house, having undertaken to enter those in question without reward, and having taken the same care of them as of his own, was not liable for the loss.

Adair, Serjt., shewed cause, contending, that as the bills of parcels were left at the defendant's house, he must have known the proper denomination of the goods. It was no excuse for him, that he lost some of his own goods by the same mistake in the entry; for though a bailee of goods may, if he pleases, throw away his own, yet he has no right to do so with those of another. Having, by gross negligence, lost the property of another, committed to his care, he is not exculpated by having lost his own property by the same negligence. Though in this case perhaps there was no intention to cheat the revenue, yet the tendency of it was to gain a drawback on exportation; whatever might be the intent, the effect was the same. The defendant was not a mere depositary, but undertook to perform a specific act. Though an action might not lie for nonfeasance, it clearly would for a misfeasance. This is agreeable to Lord HOLT's doctrine in the case of *Coggs v. Bernard*,† and answers to the *mandatum* of the Roman law, recognised in the sixth division of bailments, though somewhat improperly termed a commission, which in common

1789.
SHIELLS
v.
BLACK-
BURN.

[100]

* By Stat. 12 Ann. Stat. 2, c. 9, s. 64, a drawback is allowed of three halfpence on every pound weight of leather exported, which shall be manufactured and actually made

into goods and wares. Made perpetual by 3 Geo. I. c. 7. [Rep. Stat. Law Rev. Acts, 1867 and 1870.]

† 2 Lord Raym. 909.

1789.
SHIELLS
r.
BLACK-
BURNIE.

acceptation implies hire or reward. Admitting that a bailor is not entitled to recover for a loss, occasioned by his own folly in employing an unskilful person, where technical knowledge is required, yet here the defendant was a general merchant, used to exportation, and was to be presumed to know the proper duties payable at the custom-house. In Jones' Law of Bailments, 120, it is said conformably to Lord Holt's rule, that "a mandatary to perform a work, is bound to use a degree of diligence adequate to the performance of it."

Lawrence, Serjt., *contra*, [cited Sir W. Jones' Essay on Bailments, (p. 10);] "if the bailor only receive benefit, or convenience from the bailment, it would be hard and unjust to require any particular trouble from the bailee, who ought not to be molested unnecessarily for his obliging conduct. If more, therefore, than good faith, were exacted from such a person, that is, if he were to be made answerable for less than gross neglect, few men, after one or two examples, would accept goods on such terms, and social comfort would be proportionably impaired."

[161]

* * * Where a person professes himself to be of a certain business, trade or profession, and undertakes to perform an act which relates to his particular employment, there an extraordinary degree of skill and diligence is required from him; but where his undertaking is merely to take the same care of the concerns of another as of his own, no more can be expected from him. Puff. lib. 5, c. 4, s. 3, *Moore v. Morgue*, Cowp. 480.* in which Lord MANSFIELD's direction to the jury is in favour of the present defendant.

Adair replied, that Lord MANSFIELD's doctrine in *Moore v. Morgue*, was not applicable to the present case, because the entering goods under a false denomination was gross negligence.

HEATH, J. : †

The defendant in this case was not guilty either of gross negligence or fraud; he acted *bonâ fide*. If a man applies to a

* This case was mentioned by Mr. Justice Wilson, when the rule to shew cause was granted.
† Mr. Justice Gould was absent.

surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable. It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action.

1789.
SHIELLS
v.
BLACK-
BURN.

WILSON, J.:

Where money has been paid for the performance of certain acts, the person receiving it is, by law, answerable for any degree of neglect on his part; the payment of money being a sort of insurance for the due performing of what he has undertaken; and this rule has few exceptions. But where the undertaking is gratuitous, and the party has acted *bonâ fide*, it is not consistent either with the spirit or policy of the law to make him liable to an action. Here Goodwin wanted to dispose of his goods, which the defendant entered together with his own, without any reward. Could he be understood to be answerable for more care than he took of his own goods? There was no suspicion of any fraudulent design. A wrong entry at the custom-house cannot be considered as gross negligence, when, from the variety of laws relating to the customs, reliance must be placed on the clerks in the offices. It happened, indeed, not long since, that a man, designing to export wool under the late Act,* applied to a clerk in the custom-house to make a proper entry of it, who, not understanding the Act of Parliament, entered it wrong, and the goods were seized: when therefore such cases happen, it is too much to infer gross negligence from the mistake which the defendant committed.

[162]

LORD LOUGHBOROUGH:

I agree with Sir William Jones, that where a bailee under-

* 28 Geo. III. c. 38.

1789.
 SHIELLS
 v.
 BLACK-
 BURNE.

takes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence.

Rule absolute for a new trial.

C. P. EASTER TERM.

1789.
 May 18.
 [222]

IFIELD v. WEEKS AND ANOTHER.

(1 H. BL. 222.)

Although the plaintiff has undertaken peremptorily to proceed to trial at the next Assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, &c. without having had notice of trial. Neither will the prothonotary allow him the costs of such attendance and preparation, though he obtain judgment as in case of a nonsuit on account of the plaintiff's not proceeding to trial.

ROOKE, Serjt., moved for a rule to shew cause why the prothonotary should not review his taxation of costs, on the following circumstances.

In Michaelmas Term last, a rule for judgment as in case of a nonsuit was obtained by the defendant, the plaintiff not having proceeded to trial at the assizes at Gloucester, according to a peremptory undertaking. On taxing the costs, the prothonotary refused to allow the expenses which the defendant had incurred in attending at the assizes, subpoenaing witness, feeing counsel, &c. in expectation that the plaintiff would try the cause; and the reason of his refusal was, that no notice of trial had been given.

In support of the motion, *Rooke* cited 2 Barnes, 252, and

said, that as the plaintiff had peremptorily undertaken to proceed to trial at the assizes, the defendant was under the necessity of attending and being ready prepared with his witnesses and counsel. But,

1789.
 IFIELD
 v.
 WEEKS and
 Another.

The COURT refused the rule, saying it was the settled practice that notwithstanding a peremptory undertaking to try, it was necessary to give notice of trial; without which the defendant was not bound to take the steps which he had taken in this case.

DOE, ON THE SEVERAL DEMISES OF BURKITT AND UX.
 AND OTHERS, *v.* CHAPMAN.
 (1 H. BL. 223—227.)

1789.
 May 22.
 [223]

A devise of "all the rest and residue of my estate of what nature or kind soever," includes real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied to personal property alone.

THIS was an ejectment tried at Kingston at the last assizes, when a verdict was found for the plaintiff, subject to the opinion of the Court, on the following case:

Mary Chapman, spinster, on the 29th of June, 1778, made her will, duly executed for passing real estates, and thereby gave, devised, and bequeathed, all and every the real estate or estates, which she was any ways seised of, interested in, or entitled unto, late the estate of William Newsen, to Charles Darby and John Warner, for and during their natural lives, and the life of the longer liver of them, and after the death of the survivor of them, she gave and devised the same unto William Dobson, his heirs and assigns for ever.

She also gave, devised, and bequeathed, a messuage at Chertsey unto her cousins Anthony Chapman and Richard Chapman, their heirs and assigns for ever, to hold as tenants in common, and not as joint-tenants.

[224]

She also gave and devised unto Catherine Chapman, for and during the term of her natural life, another messuage in Chertsey, and after her decease, she gave and devised the same unto the said Anthony Chapman, for his life, and after

1789.

Doe

v.

CHAPMAN.

his decease, she gave and devised the same to her cousin George Eves, his heirs and assigns for ever.

She then gave several pecuniary and specific legacies, and afterwards devised and bequeathed as follows :

All the rest and residue of my estate, of what nature or kind soever, I give, devise, and bequeath, unto my aunt Catherine Chapman, for and during the term of her natural life, and after her decease, my mind and will is, and I do hereby direct that the same and every part thereof be equally divided between my said cousins Catherine Burkitt, Ann Hodgson, Elizabeth Hobson, and Rebecca Maynard, and the child of my late cousin Sarah Hodgson, share and share alike ; and in case either of them, my said cousins, shall happen to die before he, she or they shall be entitled to have and receive his, her or their said share, the child or children of either of my said cousins so dying shall stand in the place of his, her or their parent, and have such share as his, her or their parent would have been entitled to ; and I direct that the share which the child of my late cousin Sarah Hodgson, and also the share or shares of the children of either of them my said cousins so dying as aforesaid, shall be paid to the guardian of such child or children, and the receipt of such guardian shall be a sufficient discharge for the same.

The testatrix then gave to John Thody Hodgson, the child of her cousin Sarah Hodgson, the sum of 50*l.* over and above what he might be entitled to ; and appointed Anthony Chapman executor of her will.

She died soon after making the said will, seised of eight acres of freehold, and four of copyhold, lands of inheritance, in the parish of Chertsey, which were the lands in question, and not particularly devised by the will. She duly surrendered the copyhold to the use of her will.

Anthony Chapman named in the will, the defendant in the present action, was her heir at law.

[225]

The testatrix's aunt Catherine died after the testatrix, and during her life enjoyed the land in question.

Thomas Burkitt and Catherine his wife, Anne Hodgson, widow, William Hobson and Elizabeth his wife, Elizabeth Maynard an infant, the only child of Rebecca Maynard deceased,

and who died after the testatrix (which said Catherine, Anne, Elizabeth Hobson, and Rebecca, were the cousins of the testatrix, named in the residuary clause), and John Thody Hodgson an infant, the only child of the testatrix's late cousin Sarah Hodgson (also named in the residuary clause), were the lessors of the plaintiff.

1789.
DOE
v.
CHAPMAN.

The question was, whether they were entitled to recover the above-mentioned eight acres of freehold, and four of copyhold, lands of inheritance?

Runnington, Serjt., on behalf of the lessor of the plaintiff, made two questions:—1. Whether it was not the intention of the testatrix to pass all her property? 2. Whether lands not specifically devised should not pass under the residuary clause? The affirmative of both these questions was clear. The testatrix takes notice of all her relations. She gives an estate for life to Charles Darby and John Warner, with remainder to William Dobson in fee. She also gives a messuage at Chertsey to her cousins Anthony Chapman and Richard Chapman as tenants in common. Here were two instances of her particular bounty. The only lands not specifically devised were about eight acres, which must be taken to pass by the words "all the rest and residue of my estate of what kind soever," and be equally divided between her cousins; both because it was evidently her design not to die intestate as to any of her property, and because those words are so comprehensive as to include all of which she was possessed. That the word "estate" will pass a fee-simple is too well established to be disputed. 3 Mod. 45; 6 Mod. 106; 2 Vern. 564; Prec. Chan. 264; 2 P. Wms. 525; 1 Term Rep. B. R. 411 (1 R. R. 249); 2 Term Rep. B. R. 656 (1 R. R. 575), and *Tilly v. Simpson* there cited.

Lawrence, Serjt., for the defendant admitted the rule of law, that the word "estate" was sufficient to pass a fee-simple unless restrained by other words; but contended that the intention of the testatrix was to give her personal estate only to her cousins by the residuary clause. The heir at law is not to be deprived of his inheritance, except by express words or necessary

1789.
 DOE
 v.
 CHAPMAN.
 [226]

implication. Where words are used, which may be applied indifferently, either to real or personal property, they shall not be applied to real, to the disherison of the heir. 12 Mod. 592. * * * When she meant to give a real estate, she used technical terms for that purpose. She devises the real estates of which she was seised, to Charles Darby and John Warner, for their lives; and after the death of the survivor of them, to John Dobson, his heirs and assigns for ever. She also gives a mesuage at Chertsey to Anthony Chapman and Richard Chapman their heirs and assigns for ever to hold as tenants in common, and not as joint-tenants. These are phrases peculiarly applicable to real property. She then comes to dispose of her personalty, for which purpose the clause is introduced on which the question arises. If this clause had stopped at the words "estate, &c. to Catherine Chapman," it would certainly be a devise of real property, but it goes on to direct that the same shall be equally divided between her cousins, and that the child or children of such as should happen to die, should stand in the place of his, her or their parent, and have the parent's share. Now this could only respect personal property, since the children would inherit the parent's share of a real estate without any provision of this kind. * * *

Runnington was going to reply, when he was stopped by

LORD LOUGHBOROUGH, who said, that as the testatrix had two kinds of estates, namely, real and personal, to which the words "all the rest of my estate of what kind soever," might be applied, the Court could not restrain the meaning of them to personal property, and negative the operation of them as to real estates, particularly as they were so general and comprehensive.

GOULD and HEATH, Js., of the same opinion.

WILSON, J. :

It was plainly the intention of the testatrix not to die intestate as to any part of her property, since it appears, on the case, that she had surrendered her copyholds to the use of her will.

[227]

Postea to the plaintiff.

ORR *v.* CHURCHILL.

(1 H. BL. 227—233.)

1789.
May 23.

[227]

A bond is given from A. B. and C. to D. reciting, that “A. having received from D. a certain sum of money in the East Indies, had drawn bills of exchange there payable to D. on a house in England, and that the obligors had agreed with D. if the bills should not be accepted and paid, that they would pay the amount thereof, with interest from the day of their respective dates by way of penalty;” with a condition to be void if the bills should be accepted and paid according to the tenor thereof. On non-payment of the bills, D. is entitled to recover no more than the amount of them, with interest from the time of their becoming due.

DEBT on bond, dated Fort William, Bengal, March 14th, 1787, in the penalty of 4,470*l.* 2*s.* 2*d.* of lawful money of Great Britain. [The bond, so far as material, was as follows:]

“Whereas the above bounden Walter Cleland hath received from the above named John Orr 6017 star pagodas of lawful money of Madras, for which he was to have obtained and given to the said John Orr, bills of exchange to be drawn by the right honourable the governor in council of Fort William in Bengal aforesaid, upon the honourable court of directors of the said united company of merchants of England, which bills he hath not obtained or given, but instead thereof hath granted two sets of his own private bills upon Messrs. Baillie, Pocock, & Co. payable to the order of the said John Orr, in manner herein-after mentioned; that is to say, one set in triplicate dated Calcutta, January 29th, 1787, for 2,044*l.* 8*s.* 4*d.* payable 365 days after sight thereof, and the other set in triplicate, bearing even date with these presents, for 190*l.* 18*s.* 9*d.* payable for four months after sight thereof; and to secure the due acceptance and payment of such bills respectively, they the said Henry Churchill and Daniel Stewart have proposed, and undertaken to become bound together with the said Walter Cleland; and that in the event of the said bills or either of them being protested for non-acceptance and non-payment, that they the said Walter Cleland, Henry Churchill, and Daniel Stewart, or one of them, their or one of their heirs, executors, or administrators, shall and will upon producing to them or either of them such bill with its protest, well and truly pay to the said John Orr or his order, if

1789.

ORR

v.

CHURCHILL.

demand in England, the full amount of such bill or bills, which shall be so protested, together with interest thereupon, of 5*l.* per centum per annum, from the day of the date or dates of such bill or bills, up to the day of such payment ‘by way of penalty;’ and if demanded in India, then the full amount of such bill or bills in pagodas, at an exchange of seven shillings and four pence for each pagoda, with an interest thereupon of 10 per cent. per annum, from the date or dates of such bill or bills up to the day of such payment; and with which proposal and undertaking the said John Orr is satisfied. The condition therefore of this obligation is such, that if the aforesaid bills of exchange so drawn by the said Walter Cleland, upon Messrs. Baillie, Pocock, & Co., merchants in London, shall be duly and faithfully accepted and paid according to the tenor thereof respectively, then this obligation shall be void and of no effect, otherwise the same shall be, and remain in full force and virtue.” [The question comes to be whether interest on the bills was to be charged from the day of the date, or from the day when they became due?]

[230]

Runnington and Lawrence, Serjts., for the plaintiff :

The Court will give every legal effect to the agreement as a security for the plaintiff. By that agreement, if the bills were protested in England, whether it were for non-payment, or non-acceptance, 5 per cent. was to be paid from the day of their respective dates. This undertaking is express, which the Court will not interfere to set aside. * * * There was nothing illegal or usurious in the transaction, and where there have been no symptoms of usury, agreements of this kind have been carried into effect by courts of law. 2 Burr. 1094; Dougl. 376; 2 Term Rep. B. R. 52. But it was doubted at the trial whether the words “by way of penalty” did not bring the case within the statute, 8 & 9 W. III. c. 11. Now that statute gives a court of law the power of a court of equity in this respect, namely, to proportion the damages. The question therefore is, what a court of equity would do on the circumstances of this case. Orr supplies Cleland with money in order to have bills on the East India Company. Those bills are not procured, but others given on a private house. If Orr had remained in Bengal, he might

have required payment of his money from Cleland. It must be considered as a loan advanced, or that Cleland was guilty of a breach of trust in not performing what he undertook. In either case in point of conscience, Orr would be intitled to interest from the time he parted with his money. Then he agrees to give up this interest, if the bills were paid when they became due : but if they were not paid, he is, in that event, to have the same interest which he would have had if he had not paid the money to Cleland. This is the meaning of the agreement, and is perfectly fair and conscionable. The mere insertion therefore of the words "by way of penalty" would not be a ground for a court of equity to interfere, for if those words were left out the plaintiff would in conscience be intitled. 1 Vern. 210; 2 Vern. 316; 3 Blac. Com. 432.

1789.

 ORR
 v.
 CHURCHILL.
 [231]

Cockell, Serjt. [was heard for the defendant.]

The COURT took time to consider till this day, when judgment was delivered as follows, by [232]

LORD LOUGHBOROUGH :

We are all agreed in this case in which the question is, whether the verdict shall be entered for the whole sum at which the damages are assessed by the consent of the parties, namely, 1,459*l.* or 1,275*l.* 16*s.* 3*d.* the difference of the two sums being owing to the computation of interest from the date of the bills of exchange. It was argued that the verdict ought to go to the full extent, because by agreement of the parties the damages were liquidated, and that this was not in the nature of a common penalty, but the damages being ascertained, neither a court of law nor of equity would relieve.

But I do not go on the denomination given by the instrument, for whatever that may be, in this case there could not by any possibility have been an agreement for liquidated damages; which can only be where there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties; or to guard against the performance of acts, which if done would also be injurious. In such cases an

1789.

ORR

v.

CHURCHILL.

estimate of the damages may be made by a jury, or by a previous agreement between the parties who may foresee the consequences of a breach of the engagement, and stipulate accordingly. But where the question is concerning the non-payment of money in circumstances like the present, the law, having by positive rules fixed the rate of interest, has bounded the measure of damages : otherwise the law might be eluded by the parties. It may often indeed happen that the damages sustained by a party contracting, by the non-payment of money at the time agreed on, may by the particular arrangement of his affairs, be greater than the compensation recovered by computing the interest : but where money has a real rate of interest and value, the other party is not to be compelled to pay more than the law has declared to be such rate and value. In this transaction, the money was not a loan to the defendant to remain in his hands in India, and be repaid to the plaintiff at certain stated times ; but it was paid merely for the purpose of being remitted to Europe. That it was so paid, clearly appears from that part of the agreement, which provides, that if the bills were sent back unpaid to India, the amount of them should be paid to the plaintiff in pagodas, at an exchange of 7*s.* 4*d.* for each pagoda, and 10*l.* per cent. interest ; which must be on account of the difference of exchange. When the plaintiff could not procure bills on the East India Company, he had others on a private house, and as a security took a bond from the defendant with two other persons, to answer the value of them. But for the reasons I have stated, we think that value must be calculated from the times when the bills became due ; that the verdict must therefore be reduced, and entered for the lesser sum.

[233]

C. P. TRINITY TERM.

HAYS AND ANOTHER v. BRYANT.

(1 H. Bl. 253—254.)

1789.
June 15.

[253]

Where a bastard child is born in a parish for whose sustenance the parents neglect to provide necessaries, the parish officers are obliged to do it, without an order of justices for that purpose.

DEBT on bond dated January 16, 1782, in the penalty of 50*l*. brought by the surviving churchwarden and overseer of the poor of the parish of Ridgwell in Essex.

[The condition of the bond was to indemnify the churchwardens and overseers of the poor, and the inhabitants and parishioners of Ridgwell, against the charges which should arise or be imposed upon them, on account of the maintenance and bringing up of such child or children, as one Elizabeth Winch then went with, and should be delivered of.]

It was proved at the trial, that the defendant had agreed to pay 2*s* 6*d*. per week for the maintenance of the children, and in fact paid it up to Michaelmas, 1787, and then refused to pay any farther, alleging that the sum was too great. The counsel for the defendant objected, that the plaintiffs or parishioners were not obliged to maintain the children, without a justice's order for that purpose. But Mr. Justice WILSON who tried the cause over-ruled the objection, and a verdict was found for the plaintiffs.

A rule having been granted to shew cause why the verdict should not be set aside, and a nonsuit entered; *Bond*, Serjt., repeated the objection which he made at the trial; and cited the case of *Simpson v. Johnson*, Dougl. 7.

[254]

Cockell, Serjt., was going to shew cause, but was stopped by the Court, who held clearly that an order of justices was not necessary to make the officers of the parish liable to do what they were otherwise under a legal obligation of doing, namely, to provide necessaries for the children, and therefore

Discharged the rule.

1782.
[260]

LAWTON, EXECUTOR OF LAWTON, v. SALMON.

K. B. EAST. TERM, 1782.

(1 H. BL. 260—261, n.)

Salt-pans, being fixtures erected by the owner of a salt-spring for the profitable enjoyment of the inheritance, go to the heir and not to the executor.

In this action of trover brought by the executor against the tenant of the heir at law of the testator, to recover certain vessels used in salt works, called salt-pans, a case was reserved by consent, which stated,

That the testator some years before his death placed the salt-pans in the works; that they were made of hammered iron, and riveted together; that they were brought in pieces, and might be again removed in pieces; that they were not joined to the walls, but were fixed with mortar to a brick floor; that there were furnaces under them; that there was a space for the workmen to go round them; that there were no rooms over them; but that there were lodgings at the end of the wych-houses; that they might be removed without injuring the buildings, though the salt-works would be of no value without them, which with them were let for 8*l.* per week.

The question was, whether the executor or the heir at law were entitled to them?

Mingay for the plaintiff, said it was stated in the case that the pans were not affixed to the freehold, but might be removed; they ought therefore clearly to go to the executor. He cited *Lawton v. Lawton*, 3 Atk. 13, and the case of the cider-mill there mentioned.

Davenport, for the defendant, argued that the salt-pans were so annexed to the freehold as to pass to the heir at law both in respect to the strict rule of law and the nature of the property itself; although they were not fixed to the wall, yet they were to the floor, which is part of the freehold. Co. Litt. 53 a; 4 Co. 62; *Herlakenden's* case, Moore, 177; Owen, 70, 2 Vern. 508. As to the case relied on *à contra* in that of *Lawton v. Lawton*, 3 Atk., the question was between a tenant for life and a remainder-man,

and the distinction between such parties and the heir and executor is recognized by Lord HARDWICKE in 1 Atk. 477. Besides, a fire-engine is merely an accessory and not a principal in a colliery, but the wych-houses are of no value without the salt-pans. If they were taken away, the houses would go useless to the heir, and the executor gain nothing but old iron. On the principles of trade and public convenience which operated with Lord HARDWICKE in *Lawton v. Lawton*, the defendant is intitled. The case of the cider-mill is not reported, and was only a *nisi prius* determination of Comyns, who in 1 Dig. 594, lays it down that mill-stones go to the heir. It was the opinion of Mr. Wilbraham soon after the case of the fire-engine was decided, that the heir was intitled to fixtures of this kind, and his opinion has ever since been acquiesced in. Though the pans may be removed, yet from their nature and on the rule that the principal shall not be destroyed by removing the accessory, they ought to remain to the heir. This is not a contest between a tenant for years or life and the remainder-man, but between the different representatives of the same person.

1782.
LAWTON
v.
SALMON.

Cur. advis. vult.

On a subsequent day Lord MANSFIELD, after stating the case, said :

All the old cases, some of which agree in the Year Books and Brooke's Abridgment, agree, that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir.* But there has been a relaxation of the strict rule in that species of cases for the benefit of trade between landlord and tenant, that many things may now be taken away which could not be formerly, such as erections for carrying on any trade, marble chimney-pieces, and the like, when put up by the tenant. This is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited. There has been also a relaxation in another species of cases between tenant for life and remainder-man, if the former

* Cited by Pollock, B. in *Sanders* 54 L. J. Q. B. 576.—R. C.
v. Davis (1885), 15 Q. B. D. 219, 220,

1782.
LAWTON
v.
SALMON.

has been at any expense for the benefit of the estate as by erecting a fire-engine, or any thing else by which it may be improved ; in such a case it has been determined that the fire-engine should go to the executor, on a principle of public convenience, being an encouragement to lay out money in improving the estate, which the tenant would not otherwise be disposed to do. The same argument may be applied to the case of tenant for life and remainder-man, as that of landlord and tenant, namely, that the remainder-man is not injured, but takes the estate in the same condition as if the thing in question had never been raised.

But I cannot find that between heir and executor there has been any relaxation of this sort, except in the case of the cider-mills, which is not printed at large. The present case is very strong. The salt spring is a valuable inheritance, but no profit arises from it, unless there is a salt work ; which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessaries necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance ; he could never mean to give them to the executor, and put him to the expense of taking them away without any advantage to him, who could only have the old materials or a contribution from the heir in lieu of them. But the heir gains 8*l.* per week by them. On the reason of the thing therefore, and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt works : he might very well have said, "I leave the estate no worse than I found it." That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate. Mr. Wilbraham in his opinion, takes the distinction between executor and tenant. For these reasons we are all of opinion, that the salt-pans must go to the heir.

Postea to the defendant.

DRIVER, ON THE SEVERAL DEMISES OF BURTON, *v.*
HUSSEY AND OTHERS.

(1 H. BL. 269—270.)

1789.
June 29.

[269]

In order to discontinue an estate-tail, it is necessary that the party discontinuing should be actually seised by force of the entail.*

In ejectment, a case was reserved for the opinion of the Court, the material part of which stated, that

By a marriage-settlement, Mary Burton was tenant for life of the premises in question, remainder to Richard Williams (the intended husband), for life, remainder to trustees to preserve contingent remainders, remainder to Sarah Bishop (the intended wife,) for life, in bar of dower, &c. remainder to the first and other sons of Richard Williams and Sarah Bishop, in tail male, remainder to their daughters as tenants in common in tail general, remainder to Mary Burton in fee.

The marriage took effect, and some time afterward, Henry Burton, the husband of Mary Burton, joined with her in levying a fine *sur cognizance de droit tantum* with release and warranty of her remainder in fee, to her use for life, remainder to the use of the heirs of her body by the said Henry Burton, or any future husband in tail general, remainder to Henry Burton in fee. Richard Williams died in the life-time of Sarah (Bishop) his wife, but left no issue. Henry Burton also died without leaving issue, having devised all his estates, &c. whatever, to Michael Burton, his brother and heir at law, under whom the lessor of the plaintiff claimed. Afterwards Mary Burton and Sarah Williams, (late Bishop,) joined in levying a fine *sur cognizance de droit come ceo, &c.* of the premises, to the use of certain persons in fee, under whom the defendant claimed.

On this case, a doubt was suggested, whether the estate tail, which Mary Burton took by the fine *sur cognizance de droit tantum* was not discontinued by the fine *sur cognizance de droit come ceo, &c.*, and the remainder over to Henry Burton, divested and turned to a mere right, so as to take away the right of entry, and put the plaintiff to the necessity of bringing a real action.

* Accord. *Doe, dem. Jones v. Jones*, not take away any right of entry (3 1 B. & C. 238. A discontinuance & 4 W. 4, c. 27, s. 39).—R. C. happening after 31 Dec. 1833, does

1789.
 DRIVER
 v.
 HUSSEY.

[270]

But on a subsequent day, it was admitted by the counsel for defendants (Serjts. *Adair* and *Runnington*,) that as Mary Burton was tenant for life under the settlement, when she joined in levying the fine *sur cognizance de droit come ceo, &c.* there was no discontinuance of the estate-tail in remainder. On this point, it was stated at the bar, and assented to by the bench, as a settled rule of law, that in order to work a discontinuance of an estate-tail, it is necessary that the party discontinuing should be actually seised by force of the entail. Litt. s. 637.—*Bredon's* case, 1 Co. 76.—*Earl of Clanricard's* case, Hob. 273; * *Stephens v. Britteridge*, 1 Lev. 84.—1 Roll. Abr. 634.—Gilb. Ten. 117.—Cruise on Fines, 254, 255.

1777.
 [273]

BOONE v. EYRE.

K. B. EAST. TERM, 1777.†
 (1 H. Bl. 273, n.)

Where mutual covenants go to the whole consideration on both sides, the performance of the one is a condition precedent for the exaction of the other. It is different where a breach of one of the covenants may be compensated in damages.

COVENANT on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of 500*l.* and an annuity of 160*l.* per annum for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and every thing therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned was the non-payment of the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey.

To which there was a general demurrer.

* S. C. 2 Danv. 577; Sir Thomas Baym. 36; 1 Siderf. 83. † 2 W. Black. 1312, S. C.

LORD MANSFIELD :

The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

Judgment for the plaintiff.

1777.
BOONE
v.
EYRE.

C. P. MICHAELMAS TERM.

GUNNIS AND OTHERS v. ERHART.

(1 H. BL. 289—290.)

1789.
N^or. 9.
[289]

The verbal declarations of an auctioneer at the time of the sale are not admissible evidence to contradict the printed conditions.*

THE plaintiffs were trustees for the sale of a copyhold estate which was sold by auction. In the printed conditions of the sale, the premises were stated to be free from all incumbrances; the defendant bid for them, and they were knocked down to him; but on discovering that there was a charge on the estate of 17*l.* per annum, he refused to complete the purchase. In consequence of which this action on the case was brought.

At the trial (which came on at Guildhall at the Sittings after last term), the Counsel for the plaintiffs offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction room, when the estate was put up, that it was charged in the manner above specified.

This evidence Lord LOUGHBOROUGH refused to admit, and the plaintiffs were nonsuited.

On this day, *Bond*, Serjt., moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted,

* Acc. *Powell v. Edwards*, 12 East, 6; *Ogilvie v. Foljambe*, 3 Meriv. 53, 65.

1789. on the ground that the above evidence ought to have been
 GUNNIS and admitted. But
 Others
 v.
 ERHART.

The COURT were clearly of opinion, that the evidence was not admissible, as it would open a door to fraud and inconvenience if an auctioneer were permitted to make verbal declarations in the auction room, contrary to the printed conditions of sale; and no proof was offered that the defendant had any particular personal information given him of the incumbrance in question.

Rule refused.

C. P. HILARY TERM.

1790. ZOUCHE, ON THE DEMISE OF WARD, v. WILLINGALE.
 Feb. 5.
 [311]
 (1 H. BL. 311—312.)

A distress taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice.*

In this ejectment, tried before the Lord Chief Baron at the last assizes at Chelmsford, the plaintiff was nonsuited on the following circumstances. In September, 1787, the lessor of the plaintiff purchased the premises in fee then occupied by the defendant, who continued tenant from year to year, and to whom the lessor of the plaintiff on the 19th of March, 1788, gave the following notice to quit. "I do hereby give you notice to quit and leave the possession of all that messuage or tenement, &c. which you hold under me, &c. at Michaelmas day next, &c." The defendant not having quitted possession in pursuance of the notice on the 24th of February, 1789, the lessor of the plaintiff distrained for a year and a quarter's rent due at Christmas, 1788, viz. for the year ending at the expiration of the notice to quit, and the quarter from that time to Christmas.

* Accord. *Doe v. Johnson*, 1 Stark. N. P. C. 412. But after a verdict in ejectment for not quitting according to notice, a subsequent distress for rent due after the verdict, is not a

waiver of the notice to quit, or a ground for setting aside the verdict or staying execution. *Doe dem. Holmes v. Darby*, 8 Taunt. 538.

during which the defendant held over. The demise was laid on the 1st of January, 1789, and the question was, as appeared from the Chief Baron's report, whether the distress taken for rent accrued subsequent to the time when the defendant had notice to quit, was not a waiver of the notice?

His Lordship was of opinion that it was a waiver, and therefore directed a nonsuit.

A rule having been obtained to shew cause why the nonsuit should not be set aside and a verdict entered for the plaintiff, or a new trial granted ;

Bond, Serjt., now shewed cause :

The lessor of the plaintiff could not recover in this ejectment, having by the taking a distress affirmed and continued the tenancy, which he had before admitted by the terms of the notice. Though in *Doe v. Batten*, Cowp. 243, the mere acceptance of rent was holden not to be of itself a waiver of the notice, but to be a question for the jury, whether it was the intention of the parties that such acceptance should be a waiver or not ; yet in the present case no such question could arise, the distress being a direct acknowledgment that the tenancy continued. This principle is to be collected from Co. Lit. 212 b ; 1 Roll. Abr. 475 ; 3 Co. 64 ; *Pennant's* case, Plowd. 133, which cites 14 Assize ; *Birch v. Wright*, 1 Term Rep. B. R. 378.

Runnington, Serjt. *contra* :

As the defendant was tenant from year to year, the authorities cited from Lord Coke, which were of the waiver of a forfeiture for a condition broken, are not applicable. As the landlord might have brought an action for use and occupation, there is no good reason why he may not also bring an ejectment. In the former, there is an implied contract between the parties, founded on a supposed permission by the plaintiff for the defendant to enjoy ; in the latter, the contract is express, but the principle is the same. In *Doe v. Batten* acceptance of rent was holden not to be a waiver of a notice to quit ; and in a case there cited tried at Launceston assizes, though the plaintiff had accepted rent which had accrued after the demise, yet he both

1790.
ZOUCH
v.
WILLIN-
GALE.

[312]

1790.
ZOUCH
v.
WILLIN-
GALE.

recovered in the ejectment, and afterwards in an action for use and occupation.

LORD LOUGHBOROUGH :

There could be no question of intention left to the jury, as the taking a distress was an act not to be qualified, and an express confirmation of the tenancy.

GOULD, J. :

In the mere acceptance of rent, the *quo animo* is to be left to the jury agreeable to Lord MANSFIELD'S doctrine in the case in Cowper.* But I agree with my Lord Chief Justice that the distress was in this case an act not to be qualified, and amounted to a confirmation of the tenancy.

WILSON, J. :

I am of the same opinion. In *Doe v. Batten* there was a design to deceive the landlord, and a question I remember very well was made, whether he should be bound by the terms of the receipt in which the money was called rent for that direct purpose; which was the ground of Lord MANSFIELD'S saying, that the question *quo animo* should be left to the jury. The mere acceptance of money is equivocal, it may be in satisfaction for the trespass, or it may be for rent; and in an action of trespass for mesne profits, accord and satisfaction may be pleaded in bar if rent has been accepted. There would be no doubt, but that the plaintiff would not have been precluded by taking a distress, if instead of the year and a quarter, it had been only for rent due at Michaelmas, because the statute† says, that a distress may be taken within six months after the determination of a lease, provided the interest of the landlord, and the possession of the tenant continue: the law in this respect being altered since the time of Lord Coke, when the old notion prevailed that a distress could not be taken, unless the same relation subsisted between the parties.‡

Rule discharged.

* Receipt of rent by a banker without proof that it came to the landlord's hands, is not a waiver. N. P. C. 387.
† 8 Anne, c. 14, s. 6 & 7.
‡ See 1 Saund. 288, n.; and *Beuran Doe d. Ash v. Culvert*, 2 Campb. v. *Delahay*, ante, p. 696.

PARSONS *v.* THOMPSON.

(1 H. BL. 322—327.)

1790.
Feb. 12.
[322]

A. being possessed of an office in a dock-yard, B. in order to induce him to procure himself to be superannuated, and retire on the usual pension, agrees (without the knowledge of the Navy Board to whom the appointment belongs) in case B. should succeed him, to allow him a certain annual share of the profits of the office. B. is appointed, but does not perform the agreement. A. can maintain no action on the agreement.

ASSUMPSIT on a special agreement. The declaration stated, that the plaintiff was possessed of the place or office of master joiner of his majesty's dock-yard at Chatham, and that in consideration that he would procure himself to be superannuated in respect of the said place or office, the defendant undertook in case he (the defendant) should succeed the plaintiff to be master joiner of the dock-yard, at the commencement of his superannuation, to allow the plaintiff his extra pay from the yard books, exclusive of his superannuation money, during his natural life. It then stated, that the plaintiff confiding in the said promise of the defendant procured himself to be superannuated in respect of the said place or office, and that the defendant succeeded him as master joiner, at the commencement of his superannuation: that the defendant received divers large sums of money amounting in the whole to 200*l.* as and for the extra pay of the plaintiff; by reason whereof he became liable, &c. and being liable promised, &c. There were also the common counts. Plea general issue. Verdict for the plaintiff, subject to the opinion of the Court, on a case which stated in substance, that the plaintiff was for thirty years master joiner of the dock-yard at Chatham, and the defendant foreman of the joiners. That the defendant having a prospect of succeeding to the office of master joiner, (which does not go in regular succession, but is in the appointment of the commissioners of the navy) applied to the plaintiff to procure himself to be superannuated, which he did, on the following written agreement being entered into by the defendant.

“Agreed on the 29th day of March, 1785, between Mr. John Parsons, master joiner of his majesty's dock-yard at Chatham,

1790.
PARSONS
r.
THOMPSON.

and John Thompson foreman of the joiners of the aforesaid place. In case I should succeed Mr. Parsons to be master joiner of the said dock-yard, at the commencement of Mr. Parson's superannuation, then I do agree to allow him his extra pay from the yard books exclusive of the superannuation money, during his natural life, &c.

“JOHN THOMPSON.”

The superannuation money was an annual allowance from Government.

[323] In 1785, the defendant was appointed to the office. [A dispute having subsequently arisen as to the amount of “extra pay” mentioned in the agreement, this action was brought.]

A rule having been granted to shew cause, why the verdict should be set aside and a nonsuit entered,

Lawrence, Serjt., shewed cause :

* * * This is not an agreement for the sale of an office. The circumstances were, that the plaintiff having been a long time master joiner, was entitled to quit on being superannuated ; the defendant being in hopes to succeed him, applied to him to quit, and as a compensation agreed to allow him the extra wages. This was not a sale, because the person who gave up the office was not to appoint his successor. * * * In *Berrisford v. Done*, 1 Vern. 98, it was holden that where a bond was given to a captain in the army in consideration of his resigning his company, to which the obligor was in hopes of succeeding, the bond was valid. And in *Symonds v. Gibson*, 2 Vern. 308, bonds were allowed to be legal, entered into to procure the obligor's admission to be purser of a man-of-war ; which was a stronger case than that of money being given merely to induce a man to resign. The same doctrine is also recognised in *Ive v. Ash*, Prec. Chanc. 199. The agreement therefore in the present case was not illegal.

[324]

[The question as to what was extra pay within the meaning of the agreement, was also argued ; but in the result this became immaterial, except as appears, with sufficient explanation, in the judgment.]

Bond, Serjt., for the rule :

The agreement was both contrary to the true policy of the law, and cannot be extended to any casual extra pay, which did not exist in the yard at the time of making it. It is a principle of law that no man shall be appointed to an office, the emoluments of which are severed from it, and he is not to receive. It is equally impolitic and illegal to give money to procure the vacancy of an office, as the appointment to it. The plaintiff having an annuity on account of his superannuation, had no right to receive any further profits from the office, unless by the consent of the commissioners of the navy to whom the appointment belonged. Here the persons who have the right of appointment are deceived. That the contract is bad, sufficiently appears from the doctrine of the *MASTER OF THE ROLLS* in *Bellamy v. Burrow*, Cas. Temp. Talbot 97, and *Law v. Law*, 3 P. Wms. 392.

1790.

PARSONS
v.
THOMPSON.

Lord LOUGHBOROUGH here said, he remembered a case where a bond was given to an agent as a consideration for procuring a commission in the army, and Lord Chancellor NORTHINGTON held, that though it was the practice in the army to purchase, yet a bond given to procure a commission was bad.

[*Bond, Serjt., continuing*]:

That determination of Lord NORTHINGTON affords an answer to the cases cited from Vernon, which were of military offices sold by consent of Government, which is in daily practice. When a commission in the army is sold, the seller only receives back what he had before given: but yet an officer must have a new permission to purchase on half-pay. * * *

Lawrence replied, that in *Bellamy v. Burrow*, notwithstanding the opinion of the Master of the Rolls, Lord TALBOT ultimately decreed that Burrow was a trustee in the office for Bellamy. As to the case of *Law v. Law*, there money was actually given for procuring the office, which distinguishes it from the present case. * * *

[325]

Cur. advis. vult.

1790.

PARSONS
v.
THOMPSON.

After consideration, judgment was this day given by

LORD LOUGHBOROUGH :

On the trial of this cause two points were made, one, whether the agreement was legal, the other, what was the meaning of extra pay. The second question is immaterial, if the first be against the plaintiff. But it is to be observed, that if the construction be as the plaintiff contends, that all which the defendant could receive as master joiner would be 2s. 6d. a day, the objection to the validity of the agreement is still more apparent ; because it would have this effect, that no exertion of the defendant for which extra pay would be due would be beneficial to himself, which might produce public mischief. But taking the agreement on this point in a restrictive sense, that it means a certain stated and fixed allowance beyond 2s. 6d. a day, understanding it to be a defined known share of perquisites, we are all of opinion that it does not afford a just cause of action. Every action on promises must rest on a fair and valuable consideration, which it is for the plaintiff to make out. What is the consideration stated here? That the plaintiff represented himself as unfit for future service, and entitled to a pension for the past. This he did at the request of the defendant, on the promise from him of a certain allowance. Now the representation was either true or false. If true, there was no ground for any bargain with the defendant : the plaintiff did nothing for the defendant ; all he did was for his own ease and advantage. If

[326]

false, the public is deceived, the pension misapplied, and the service injured. It is not stated that the plaintiff procured the appointment for the defendant, (which would clearly have been brocage of office, and bad), but that he made way for the appointment. But from thence no valuable consideration can arise. Had the transaction passed with the knowledge of the Admiralty, judging of the case, and applying at their discretion the allowance they are bound to make, possibly it might have stood fair with the public : I say possibly only ; to be sure the ground of deceit on the public would be done away. But this case rests on a private unauthenticated agreement between the officers themselves, which cannot admit of any consideration

sufficient to maintain an action. If it could be proved that it was to be measured by money so as to form a valuable consideration, it must be in respect to the time when it was made, when the plaintiff was prevailed upon to retire in favour of the defendant. In this view it certainly would approach very near to brocage; it would differ very little in effect from selling the interest itself, though there would be a difference in the conduct of the party, who in the one case would be passive, in the other active. But his passive merit, if I may use the expression, would not avail him where his active exertion would be a demerit. The case cited from 1 Vern. 98, I think may be supported. It was of the purchase of a commission in the army, which the Duke of Ormond refused to ratify on the ground that the plaintiff had bought without the other party having leave to sell, who had not bought. I should rather suspect from the usual inaccuracy of the cases in Vernon, that the plaintiff got the commission by succession, and set up this defence against the payment of the bond. There is something very like it in the reasoning of the Court, who held there was no relief against the bond. The question of the consideration did not occur to them; and they seem to have holden that where commissions were generally saleable, there was nothing unfair in such a transaction. The next case in 2 Vern. 308, if true, is a decision undoubtedly contrary to what we now decide, and I think contrary to an evident principle of law. On the state of the report, the bonds are directly and plainly given for brocage of an office of trust and profit, which is not an object of sale. I have therefore no difficulty to say that I hold that case to be extremely ill determined, if the note of it be at all correct. The case of *Ive v. Ash*, Prec. Chanc. 199, I think rightly determined; there was a purchase of a commission allowed to be sold; the commission was given up, and the purchaser wanted to get rid of the bargain, and be free from the agreement. He objected that a commission in the marines could not be sold; but it turned out upon examination that the sale of such commissions was permitted, not being looked upon as within the statute. I therefore hold that case to be well adjudged: for the question whether an office is saleable or not is a matter of public regulation, and not

1790.

PARSONS
v.
THOMPSON.

[327]

1790.
PARSONS
v.
THOMPSON.

a question for a court.* If by public regulation right or wrong, certain offices are saleable, the Court cannot set aside the transaction for their sale; the Court is not to make the regulation. Whether by the general policy of the country an individual office is saleable or not, is not a matter of law. But in the present case there is no ground to say, that the defendant's office was sold under any regulation, or that the transaction between the parties was carried on under any authority, or with the consent of their superiors. This agreement resting on private contract and honour, may perhaps be fit to be executed by the parties, but can only be enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promise, but legal obligations are from their nature more circumscribed than moral duties.

Judgment for the defendant.

The following case [is reported in 1 H. BL. (p. 327), in connection with the preceding case.]

GARFORTH v. FEARON.

1787.
Nov. 22.

[327]

MICH. TERM, 1787.

(1 H. BL. 327—334.)

A. by the interest, and on the application of B., is appointed customer of a port, having previously signed an agreement, declaring that his name was used in the application in trust for B., that he would appoint such deputies as B. should nominate, and would empower B. to receive the profits of the office to his own use. On the failure of A. to comply with the agreement, no action upon it will lie against him.†

THIS was an action of *assumpsit* for money had and received, brought by the direction of the Master of the Rolls, in consequence of a bill filed in equity by the plaintiff and his son, praying that the defendant might be declared a trustee of the office of customer of Carlisle for the plaintiff, for the benefit of the *son.‡

[*328]

* This distinction was recognised in *Blackford v. Preston*, 8 T. R. 94, reported *in loco*, post.

† This appointment of Mr. Fearon afterwards gave rise to two actions in the Court of King's Bench,

Fearon v. Pearson, and *Fearon v. Potter*, in both of which the plaintiff failed. Willes, 577, n.

‡ The plaintiff had given up the profits to his son in 1780.

On the trial of the cause at the Sittings in Trinity Term, 1787, before Lord LOUGHBOROUGH, it appeared in evidence, that application was made to the Lords of the Treasury by the friends of the plaintiff, to procure for the defendant the office of customer of the port of Carlisle. On the 25th of February, 1773, the defendant signed the following declaration, "I do hereby declare, that my own name was made use of in trust for Mr. John Garforth, on the application made to the Lords of the Treasury for the office or place lately held by Mr. Grape deceased, in the county of Cumberland; and I do hereby promise, in case any appointment has been or is made thereof, that I will, upon request, appoint such Deputy or Deputies as he shall nominate, and also empower the said Mr. Garforth to receive the salary, stipend, wages, and fees of the said office to his own use.

1787.
GARFORTH
v.
FEARON.

"Witness my hand, BENSON FEARON."

On the 27th of February, 1773, the defendant was appointed by patent* to the office, and afterwards on the nomination of the plaintiff, constituted deputies for Carlisle, Whitehaven, and Workington; but having received the profits, did not account for them to the plaintiff; in consequence of which the bill was filed. A verdict was found for the plaintiff, with leave to move

* The following was the form of the patent:—

George the Third, by the grace of God of Great Britain, France and Ireland King, Defender of the Faith, and so forth. To all to whom these presents shall come greeting. Know ye, that we of our special grace, certain knowledge, and mere motion, have constituted and appointed, and by these presents do constitute and appoint our trusty and well-beloved Benson Fearon, Esquire, to the office of customer or collector of all our customs and subsidies in our port of Carlisle, and in all and singular the ports, places, and creeks, to the said port belonging or adjoining, in the room and place of Richard Grape, Esquire, deceased; to have, hold,

exercise, and enjoy the said office unto him the said Benson Fearon during our pleasure, together with all and every the wages, fees, profits, perquisites, advantages, and emoluments whatsoever, to the said office or place in any wise belonging or appertaining, and in as full and ample manner and form to all intents and purposes, as the said Richard Grape, or any other person or persons lately exercising the said office, hath or have had or received, or ought to have had or received, by reason thereof. In witness whereof, we have caused these our letters to be made patent. Witness, ourself at Westminster, the twenty-seventh day of February, in the thirteenth year of our reign, &c.

1787.
GARFORTH
v.
FEARON.

the Court to enter a nonsuit. On a rule to shew cause being granted, the case was argued by *Adair* and *Rooke*, Serjts., for the plaintiff, and *Le Blanc* and *Lawrence*, Serjts., for the defendant; and the following judgment of the Court was delivered by

LORD LOUGHBOROUGH :

[329]

On full consideration of all the arguments used in this cause, I am of opinion that the transaction which is the foundation of the action is illegal, and the agreement void. This transaction concerns a public office, deemed by law to be a place of public trust, prohibited to be sold; and even the deputation of which, where such deputation may be made, cannot be an object of sale. The transaction is, that Fearon being appointed by the recommendation of Garforth, shall not interfere in the office, but shall appoint such deputies as Garforth shall nominate and pay to him the profits. The effect of this is, that to all profitable purposes, and as to all the exercise of the office, except as to signing a receipt for the salary, Garforth is the real officer, but is not accountable for the due execution of it; he may enjoy it without being subject to the restraints imposed by law on such officers, for he does not appear as such officer; he may vote at elections, he may exercise inconsistent trades, he may act as a magistrate in affairs concerning the revenue, he may sit in Parliament, and will be safe if he remains undiscovered. If extortion be committed in the office by those appointed, the profits of that extortion redound to him, but he escapes a prosecution; for not being the acting officer, he does not appear registered upon the records of the Exchequer, and is not liable to the disabilities imposed by the statute on officers guilty of extortion, who are incapacitated to hold any office relating to the revenue. Whether a trust can be created in such an office, is for the consideration of the Court in which the suit was originally brought: the only question in this Court is, whether the agreement springing out of such a transaction can support an action?

The written agreement of the 25th of February, 1773, was for two purposes: one, to appoint such deputies as the plaintiff

1787.
GARFORTH
v.
FEARON.

should name; the other, to pay over to him all the profits of the office. Though this case has been argued very fully and very ingeniously by the counsel on both sides, I do not recollect any argument used in support of the first promise; namely, to appoint, at the nomination of another, deputies, for whom the person appointing is in point of law answerable, and whose places he is not allowed to sell or bargain for. The argument and doctrine laid down in the case of *Smith v. Coleshill*, 2 And. 55, which is similar to this, are, that if one part of the agreement were bad, no action could be maintained on any other part which might be good. But it is not necessary to rest on this point, because I am of opinion that the agreement is bad in both parts. If it be without any consideration in a court of law, no action will lie upon it; it is but *nudum pactum*. What then is the consideration upon which this agreement proceeds? It is that Fearon is appointed on the application of Garforth, in trust for him; this is the consideration. Now what is this but, in plain terms, this proposition; viz. that the Public is abused, and the King deceived, in the application? I should therefore not find much difficulty to conclude, if there were nothing more in the case, that the common law would not support an *assumpsit* on such an agreement.

[330]

But I think it is clearly void by positive law respecting this office. The appointment of any customer by any means contrary to the statute 12 Ric. II. cap. 2, is a misdemeanor. That statute, though very ancient, is certainly not obsolete; it is the statute under which they are sworn in the Exchequer. It not only prohibits the appointment, but goes on to say that "none that pursueth by him or by others, privily or openly to be in any manner of office shall be put in the same office or in any other," and the 5 & 6 Edw. VI. cap. 16, makes void all promises, bonds and assurances, as well on the part of the bargainor, as the bargainee. It is said that this was no sale of the office, that no money has passed on the part of Fearon to obtain it. But the statute does not stop there. It is neither confined in its expressions nor its intent. In the case where a person obtaining an office gives money, the words of the Act are extremely general, and according to their obvious construction without any enlarge-

1787.
GARFORTH
v.
FEARON.

ment necessarily require that all bargains for money concerning those offices which are mentioned in the statute, are and shall be prohibited. Now is it not clear that the plaintiff has bargained with the defendant? Would the defendant have had the office without that bargain? The promise, which is the ground of this action, is, that the plaintiff shall have all the profits. By the words of the statute any profit however small, would have affected the transaction; but here there is a bargain for the whole. Courts of law have very properly considered this as a remedial statute, and have construed it liberally where the validity of such transaction has been brought before them.

[331]

The case of *Sir Arthur Ingram** has been cited, and there it is clear that the transaction was not immoral; it was no otherwise wrong than as it was prohibited by a positive statute. It was a bargain between Sir Edward Vernon and Sir Arthur Ingram, for a surrender of the office of cofferer of the household; on the surrender of Vernon, Ingram was appointed, and a bond given to account for the profits. This was holden to be within the statute, because he had charge of the King's money to pay the household. In that case the King was not deceived, the transaction was public and notorious, and the Crown was disposed to have re-appointed the officer with a *non obstante*; but the question being referred to the CHANCELLOR and twelve judges, whether the King could by a *non obstante* give the right of receiving the appointment to Ingram, their opinion was, that the case was within the statute, and therefore that Ingram was disabled from taking the office, and could not by a *non obstante* be made capable of holding it. In the case of *Godolphin v. Tudor*, 6 Mod. 234, which is also in 2 Salk. 251,† which was mentioned in the argument, the transaction was between the principal and the deputy, and the agreement was, that the deputy executing the office should pay to the principal, out of the profits, a certain sum. The Court there held, that where the agreement was to pay out of the profits a certain proportion of the profits, it was not within the statute; and the reason given is very plain, and carries its own authority with it, namely, that the principal is

* Co. Lit. 234, a.

stated Willes's Rep. 575, n.

† S. C. 1 Salk. 468. More fully

entitled to all the perquisites and fees of the office, and the deputy to a recompense, as it were on a *quantum meruit* for the labour he has in the execution of it. All the effect therefore of such an agreement is to ascertain the share which the deputy should have for the execution of the office. But it is remarkable with what strictness the Courts have holden that proposition, and how careful they have been to guard against any transaction that might give any colour to the principal's receiving a gross sum out of the profits of an office executed by a deputy. For in this case, as it is reported in 6 Mod. the agreement was that Tudor should pay Godolphin 200*l.* a year, and it appeared upon record that the profits of the office amounted to 329*l.* 10*s.* every year in which it had been executed by Tudor ; but as the stipulation was to pay 200*l.* a year absolutely without any reference to the profits of the office, the Court thought themselves bound to give judgment for the defendant. Now that was a transaction perfectly fair, the mistake in stating the manner of the agreement was an innocent one, but the Court would not permit the plaintiff to recover on an agreement, where it was not stated on the agreement itself that the payment should be only of a portion of the profits, and not an absolute one of the whole.

Courts of equity, in setting aside securities supposed to be valid at law, have gone by the same rule, and have been just as careful not to permit by any construction, any breaches to be made in the provisions of the statute. The case of *Lockner v. Strode*, 2 Chan. Cas. 48, was quoted as a determination, where the Court of Chancery held a looser rule with respect to giving a bond for the payment of a certain sum to the principal appointing a deputy. But that case is, as most of the others are in the same book, grossly misreported ; no such determination was made, and both the state of the case and the decision are perfectly mistaken. I have a copy of it from Lord NOTTINGHAM's notes, from which it appears that the defendant being sheriff, made John Lockner his under-sheriff ; and the plaintiff who was the brother of John Lockner gave a bond as a temporary security till the common security was given. John gave a bond in the usual form from an under-sheriff to his principal, for performance of the covenants in the indenture ; but the first bond was

1787.
GABFORTH
v.
FEARON.

[332]

1787.
GARFORTH
v.
FEARON

not given up. Strode, after he was out of office, arrested the plaintiff on it, who was obliged to give bail to Sir Francis Rolle, the succeeding sheriff, in 600*l.*; and to be relieved was the object of the bill. The defendant pleaded a special agreement, that the bond was to secure him 400*l.* by quarterly payments for the under-sheriff's place. This the plaintiff denied, and also insisted that such an agreement was illegal, and contrary to the statute 23 Hen. VI. cap. 9. The CHANCELLOR being under doubts, a trial was directed, and the point reserved. So that no opinion was given by him on the validity of the transaction. The date of that case is also mistaken; it is stated in the report to have been Feb. 9, 1680, but it was in fact in Hilary Term, 28 Car. II. But in a subsequent case, Lord NOTTINGHAM very plainly intimated what would have been his opinion, if the agreement had been found good in law. That was the case of *Juxton v. Morris*,* which is in the same book, and also misreported. By Lord NOTTINGHAM's notes, it appears that a bishop's registrar made a deputation of his office, rendering thereout 90*l.* per annum; the plaintiff exhibited a bill for an account, and the defendant pleaded that it was within the statute of 5 & 6 Ed. VI. and that there ought to be no account. It was answered, that this was only a reservation of part of the profits, and the principal being entitled to the whole it was not illegal; which (says Lord NOTTINGHAM), "seemed specious." But upon looking into the bill, it charged an express covenant to pay 90*l.* a year, without reference to the profits of the office. The plea was therefore

[333] allowed, and the bill dismissed. These cases connected, shew that the opinion of the Court of Chancery at that time, in considering how far these securities were liable to be avoided as contrary to the provisions of the statute, was, that between principal and deputy there might be a reservation out of the profits, (though Lord NOTTINGHAM did not expressly so determine,) but if otherwise, the security was clearly bad. In the case of *Law v. Law*,† Lord TALBOT set aside a bond supposing it to be good in a court of law, the consideration of which differed very little from the present. On the part of the plaintiff, the case of *Bellamy v. Burrow* was relied on, as an authority to

2 Chan. Cas. 42.

† 3 P. Wms. 392.

shew that a court of equity will permit a trust to be created of an office, clearly within the statute of Ed. VI.; and on reading that case with attention, I admit it is a determination full to the point for which my brother ADAIR cited it; and undoubtedly as such a determination it is of very considerable authority, both in respect to the learning and the known integrity of Lord TALBOT. But it is fit to be observed, that in the same case there stands very fully delivered the opinion of Sir JOSEPH Jekyll to the contrary; and it rests upon an opposition between two very learned and upright men. Either opinion is probable, when there is such authority for its support. I will not enter into the consideration of that case, nor is it necessary to give an opinion here, whether a trust can in any instance be created in such an office. I do not take upon myself to say, without other consideration than the present circumstances can afford, that there is no possible case in which a trust fit to be executed may not be created in offices within the statute of Ed. VI. This is not a case of the execution of a trust, the cognizance of which is peculiar to a court of equity. Perhaps if the Master of the Rolls had fixed on Fearon the character of a trustee, a court of law might not think itself at liberty to question the authority of the determination. But the whole question for a court of law to determine is simply, whether there appears a good consideration on which an *assumpsit* can be supported? And I am of opinion, for the reasons I have stated, both on the principles of the common law, and because the transaction is in defiance of the statutes which have been made to guard against the evils of the same nature, that the consideration of the promise in this case is bad, that consequently it will not support an *assumpsit*, and therefore that a verdict must be entered

1787.
GARFORTH
v.
FEARON.

[334]

For the defendant.

1790.
Feb. 12.

[334]

COMPTON v. COLLINSON.*

(1 H. Bl. 334—351.)

Where a married woman lives apart from her husband under articles of separation, by which he covenants that she shall enjoy to her own use all such estates, both real and personal, as shall come to her during the coverture, and that he will join in the necessary conveyances to limit them to such uses as she shall appoint; and copyhold lands having afterwards descended to her, the husband again covenants in the same manner as before, and that he will join in surrendering such estates to such uses as she shall appoint; the wife may surrender the copyhold lands without the husband joining, and without a special custom for that purpose.

THIS was a case sent out of Chancery for the opinion of this Court.

[The question was as to the validity of a surrender of copyholds by a married woman as a *feme sole*, under the title described in the judgment of the Court this day given by]

[340]

LORD LOUGHBOROUGH :

The question in this case is whether John Willis took any and what estate under the surrenders, will, and codicil of Jane Collinson, or under either, and which of them? The subject of dispute being copyhold lands it is evident that unless the surrenders be valid no estate can pass at law. No special custom is stated, and therefore the surrenders must be judged of by the general law of copyhold estates. The several surrenders on the face of them are the surrenders of Jane Collinson as a *feme sole*: for it is not stated that she was privately examined, nor is any notice taken of her being a *feme covert*, nor is there any assent or evidence of assent on the part of the husband accompanying the surrenders. She is stated by the case to have been in truth the wife of Michael Collinson, separated from him, first, by articles renouncing all his right to whatever estates, real or personal, might come to her during the coverture; and secondly, by deed, after the copyhold estates had descended to her, covenanting that she should enjoy the same to her own use; and that he would join in making a surrender of such estates, and in limiting them to such uses as she should appoint. By force of these articles,

* *Vid.* 2 Brown Rep. Cha. 377.

and of this deed, all the right of the husband is barred. The question therefore is, whether the surrenders of Jane Collinson, her husband not having joined, shall bar her heir? There are two distinct surrenders of each copyhold: the first made May 26 and June 8, 1771, to the use of her will; the second, July 14 and 15, 1772, absolute surrenders to John Willis, on which he was admitted and which he on the same day surrendered to the use of his will. If Jane Collinson had a full power to make a valid surrender, the last surrenders have passed all her estate at law to her surrenderee. These surrenders took effect immediately, she could not herself have avoided them, nor could the husband against his own covenant. If she had sued jointly with her husband to avoid them, it would have been incongruous to have alleged as a defect in the surrender, the omission of that which the husband had covenanted to do, and which it was in her power to procure; and if she had sued as a *feme sole* against her own surrender, it would have been still more preposterous. If therefore Jane Collinson could not have avoided these surrenders, it is difficult to conceive how her heir should be in a better condition with respect to an absolute surrender binding upon her, whatever claim he might have against a surrender to the use of her will. It cannot be more necessary that the husband should join with his wife in the surrender of her copyhold, than in levying a fine of her freehold estates. But it has been settled ever since the case in the 17 Ed. III.* that if a fine be levied by a *feme covert* without her husband, it shall bind her and her heirs, if it be not avoided by the husband; and both Rolle and Comyn† seem to intimate that the law would be the same as to a recovery. Had the present case been of a freehold estate conveyed by the wife by fine without her husband, it would clearly have bound her heirs, and the husband being estopped by his deed, the estate of the conusee would have been indefeasible at law. The modes of conveying freehold and copyhold estates are different, but there is surely a fair argument from analogy, that a copyhold estate transmissible under the

1790.
COMPTON
v.
COLLINSON.
[341]

* Year Book, 17 Ed. III. 52 & † 1 Roll. Abr. 346; l. 50, Com. 78, 17 Assi. pl. 17, Bro. Abr. tit. Dig. tit. Bar. & Feme (p. 1). Fines, pl. 75.

1790.
COMPTON
v.
COLLINSON.

[342]

same circumstances as a freehold, should be governed by the same rules. Both are public conveyances ; and from the nature of copyholds, there is more reason to support the surrender of a *feme covert* where the interest of the husband is not affected by it, than there is to make a fine effectual without his joining. Of a freehold estate the husband is seised in right of his wife, of a copyhold he has a mere possession. He is not admitted in her right ; she is the actual tenant ; and when a copyhold descends to a married woman, the new grant of the lord is to her and not to the husband. In opposition to this reasoning, two cases were cited at the bar which were supposed to have denied the application of any argument drawn from the case of a fine, to the validity of a surrender ; and to have asserted the absolute nullity of a surrender by a *feme covert* without the concurrence of her husband. The first of these cases is *Taylor v. Philips*, 1 Ves. 229. Now all that can be inferred from that report of Lord HARDWICKE's opinion is, that if the fact had been fully before him, he would have made a case for the opinion of a court of law upon this very question, whether a surrender by a *feme covert* without her husband's joining, but with his assent, was an effectual surrender ? But as there was some reason to suppose there might be a special custom to warrant that surrender, he directed a trial. It is evident, then, that Lord HARDWICKE was of opinion that a custom for a *feme covert* to surrender without her husband joining, might be a good custom, for otherwise the trial would have been idle, and he would have directed at once a case for the opinion of the judges. This observation will also materially apply to the next case, which is *Stephens v. Tyrell*, 2 Wils. 1, where, according to the report, the Court of Common Pleas held that a custom for a *feme covert* to surrender without her husband's joining is contrary to law, and bad. In this case it is said, that the CHIEF JUSTICE observed that it was not stated whether the husband was to consent though he did not join, and therefore it must be taken to be without his consent. Now the natural inference from thence is, that the consent of the husband, though he did not join, would have made the surrender effectual. The CHIEF JUSTICE there censures an inaccuracy in 2 Danvers' Abridgment, 480, pl. 10, cited in support of the custom,

1790.
COMPTON
v.
COLLINSON.

[343]

and the remark is just. But when one looks into the cases referred to in Danvers, it is evident that they furnish an authority in support of a surrender without the husband's joining in the act of the surrender. The first is an anonymous case in Moore, 123, where a custom for a married woman to devise her copyhold lands with the assent of her husband was holden to be good. The next are 3 Leon. 81; Godb. 14 & 143; and 2 Brownl. 218, which all treat of the same case, viz. *Skipwith's* case. There were two parts of the custom alleged in that case, the one that a married woman might devise, the other that she might surrender in the presence of the steward and six of the tenants. The state of the case in Lennard shews that the will was made in favour of the husband, in the presence of the steward and six of the tenants, and at the next court the surrender to the use of the will was also in the presence of the steward and six of the tenants. The custom seems to have been holden good in substance, and it is probable that it was so from the citation in 2 Brownl. 218.* This is therefore an authority, that a surrender without the husband's joining, though certainly in a case where his assent might be presumed, is good. The reasoning of the CHIEF JUSTICE, according to Wilson's report, proceeds upon a supposition that the custom stated excludes the husband entirely, because it does not expressly require his consent, and that it would therefore enable the *feme covert* to dispose of her estate against his consent. But this is by no means a necessary conclusion. A surrender without the husband may be a good disposition against all but him, and his right to avoid it is not inconsistent with such a custom. The reasons therefore on which the custom in Wilson is condemned, do not appear quite satisfactory; and it has always appeared to me somewhat arbitrary to condemn a custom because it is not conformable to the general law and policy of the nation. That estates should be holden in some manors by an heiress independent of her husband, is not more singular than in others that the estate should vest absolutely in the husband by the intermarriage, which is the case in some manors in Westmoreland. This case then goes no further than an opinion that a surrender in which the husband neither

* It is there cited, *arguendo*, by the name of *Skegg's* case.

1790.
COMPTON
v.
COLLINSON.

[*344]

joins nor assents cannot be good ; but if that opinion were well founded, it would not affect the present case. In both Vesey and Wilson, the observation made on the analogy of a fine is, that it works by estoppel. In the case in Vesey, Lord HARR-
WICKE is speaking of the fine of a tenant in tail, where no interest passes, which he says will be good against the heir by estoppel, and the phrase is there correctly used. But as to a *feme covert* levying a fine where it conveys an interest, it shall bind her and her heirs, if the husband does not enter and avoid it, because, says Lord Coke, she was examined, and has power over the land. 10 Rep. 43 a. The fine there passes the estate, and when it is said that she is estopped *by it, the expression is used in the same loose manner as when it is applied to any other person contending in opposition to his own deed, by which he has passed away the interest and estate which he would claim.

It was objected in the argument that no custom is stated in the case, and that a surrender by a *feme covert* even with the husband's joining can in no case be good but by the particular custom of a manor. No authority was cited for this position, but it was argued that from the several cases, viz. Dyer, 363 b, Cro. Eliz. 717, and Litt. Rep. 274 (in which the validity of a custom for a *feme covert* being separately examined, and her husband joining to make a surrender, is affirmed) it was strongly implied that such a surrender would not be good by the general law of copyholds. This objection rests on a supposed defect in the statement of the case. But the Court will intend that the surrender by the wife separately examined with the husband joining, would have been good. The case could not otherwise have been made, and even if the argument had been upon a special verdict, the objection would not prevail. For it would be contrary both to law and reason, that the copyhold of a woman should become unalienable by her marriage, and it is against the nature of copyhold estates that they should not be surrendered back to the lord by the act of all the persons having any interest in them, and having a disposing power.

Lord Coke says, "This is the general custom of the realm, that every copyholder may surrender in court, and need not to allege any custom therefore," Co. Litt. 59 a, and in *Combe's*

case, 9 Rep. 75, it is holden to be a necessary consequence of this, that every copyholder may surrender by attorney, as a thing incident by the common law; and in the pleadings of that very case, a surrender by a *feme covert* and her husband is pleaded, without any custom being alleged. Co. Entries, 576. The cases which are said to afford a negative implication, that without a custom the surrender by a husband and wife of the copyhold of the wife would not be good, cannot be so construed. The case in Dyer 363 b, arose upon a question whether a custom in the vill of Denbigh, that a *feme covert* with her husband, by surrender and examination in court might alien her land, was taken away by the statute of Wales, 27 Hen. VIII. c. 26, and the opinion of Dyer and Wray was, that such custom was not abrogated, because it was reasonable and agreeable to the custom of England for the assurance of purchasers. The case in Cro. Eliz. 717, states a question, whether the examination of a *feme covert* out of court by two tenants be good without a special custom; and it is holden that it is not, because it is a judicial act more proper to be done in court; admitting at the same time that a surrender on a sole examination in court would bind her by the custom *i.e.* by the general custom; for though the state of the facts does not appear by the report, it is fairly to be collected that no special custom for a *feme covert* to surrender in court was given in evidence. The short note in Litt. Rep. 274, seems more to favour the argument than the two preceding cases, which attentively considered rather make against it. But it may easily be discovered why in the case in Littleton, the defendant chose to allege a custom rather than to rely on the general law. He makes use of terms much more extensive than the general law: he pleads a custom that *quælibet fœmina viro co-operta* (including infants) may surrender; the plaintiff replies that every woman of full age may surrender without traversing the custom that *quælibet fœmina*, &c. and the court holds the replication bad, for he ought to have traversed the custom alleged by the defendant. It might be a question, whether by special custom a *feme covert* infant could not surrender, though it is contrary to the general law, and therefore it is pleaded that every *feme covert* may surrender; but such a case affords no inference

1790.

COMPTON
v.
COLLINSON.

[345]

1790.

COMPTON
v.
COLLINSON.

that it was necessary to allege a custom for the general position, that a *feme covert* with her husband might surrender.

For these reasons, this objection ought not to prevail even so far as to induce the Court to desire a fuller state of the case; which would be the only effect it could have; for the customs of most manors being consonant to this general law, there is little doubt but such a custom might be truly stated in any case where it were necessary that it should be particularly alleged.

The general objection to the validity of the surrenders, viz. that by the common law a *feme covert* is incapable of disposing of her lands without the concurrence of her husband, has been in part already considered; but it may be fit to examine this position more particularly. It certainly is generally speaking a true one, though perhaps not quite correctly expressed; for a *feme covert* has no power to convey with her husband, except by fine or recovery. It would be more accurate to state the law to be, that a married woman can make no conveyance of her lands except by fine or recovery, and that a fine levied by her alone is avoidable only by her husband. It is equally a general rule of law, that a *feme covert* cannot sue or be sued without her husband, and that she can make no contract to bind herself.

[346]

These rules are established on the principle (partly religious, and partly political) that she has entered into an indissoluble engagement, by which she is placed under the power and protection of her husband, given up to him all personal property in her actual possession, and the right to receive all such as may be reduced into possession. To these general rules there have been in the process of the law various exceptions allowed, where the principle of the rules could not be applied to the circumstances of the case. In the case mentioned in Co. Litt. 132 b, and stated at large in Ryley, Plac. Parliam. 19 Ed. I. p. 66, the husband having abjured the realm for felony the wife was permitted to sue, and had judgment to recover seisin of an estate, of which she was jointly enfeoffed with her husband for life against the lord who after satisfaction made to the King for the year, day and waste, claimed to have the land by escheat. In the 31 Ed. I. it was holden, that the wife of one who had abjured the realm could make a feoffment by deed with warranty of her

land, and should be bound by it. Fitz. Abr. *cui in vita*, pl. 31. In the 10 Ed. III.* a *quare impedit* was brought for the King against the Lady Maltravers; she pleaded coverture, and upon the replication for the King, that her husband was exiled for a certain cause, she was ruled to answer. In the 1 Hen. IV.† the same point was determined in the case of the Lady Bellknap whose plea of coverture was overruled on a replication that her husband was exiled: and in the following year, 2 Hen. IV. the same lady sued in her own name, and her suit was allowed. Lord Coke does not take notice of a circumstance mentioned in the Year Book‡ and in Brooke's Abridgment,§ that some of the justices said, she sued as farmer of the King; which seems to strengthen the authority, for it shews that during the exile of her husband, she acted as a *feme sole*, holding an interest under a grant from the King, by which she might both sue and be sued alone.

1790.
COMPTON
v.
COLLINSON.

A *feme covert* may convey in execution of a power, Sir W. Jones, 137; and Latch, 39, and 134; and though in that case there is much debate in the Court, and a difference in opinion, whether the wife had any estate, and whether she could convey in execution of a trust without her husband, yet all agreed that her feoffment without her husband was a valid act. A *feme* may execute a power to sell lands without her husband, and may sell them to him. Co. Litt. 112 a. A *feme covert* may act in *auter droit* as an executrix without her husband; and it is said, that she may administer, or prove the will, notwithstanding his refusal. Com. Dig. Administration (D). In the three instances last mentioned, the law supports the act of the wife alone, because the husband has no interest in the execution of it; and in all the former instances she is enabled to act by herself, because she cannot have the authority of her husband, whose exile or abjuration, though it does not dissolve the marriage, suspends the marital power.

[347]

Cases of separation, and in consequence of the relinquishment of the marital rights by the agreement of the husband, were not

* Co. Litt. 132, b.

† 2 Hen. IV. 7, pl. 26.

‡ Co. Litt. 133, b, case of *Sibel*,

§ Tit. Baron and Feme, pl. 66.

B. Year Book, 1 Hen. IV. 1, pl. 2.

1790.
COMPTON
v.
COLLINSON.

likely to have often occurred in the simplicity of ancient times. But there is a case in the Year Book 47th of Ed. III. c. 18,* which shews that they were not then totally unknown in the law. "An action of account was brought against one as bailiff of the plaintiff's land, to which the defendant pleaded, that there was a debate between the plaintiff and his wife on which by the accord of their friends, the plaintiff assigned to his wife for her maintenance the lands of which the account was demanded, and that the wife leased these lands to him for a term of years. The plaintiff insists this is no plea, and amounts merely to a denial of the defendant being bailiff; but the Court held that he must answer the plea. And then the plaintiff traverses the lease alleged to be made by his wife." This case seems to prove that a *feme covert* might dispose of the profits of lands allotted for her maintenance, and make a lease of them without her husband joining in the lease. In Croke Charles there are two cases on bonds given to secure the disposal of a sum of money by a married woman. The first of them was in the 5 Car. I. Cro. Car. 219.† It was an action upon a bond given by a man after marriage, conditioned to permit his wife to make a will, and dispose of a sum not exceeding 50*l.* in legacies: the defendant pleaded that the wife did not make any will, and on that plea issue was joined. It was found specially that she did make a will, and disposed of divers legacies not exceeding 50*l.*, but that she was *covert* at the time of making the will. Judgment was given for the plaintiff, for though by a law a *feme covert* could not make a will without her husband's assent, yet it was a will within the meaning of the condition. The other case was in the 10 Car. I. Cro. Car. 376. It was an action on a bond conditioned to pay 300*l.* after the death of the wife by the husband, in case he survived, for such uses as she should appoint by any writing under her hand and seal, in the presence of two witnesses. The defendant pleaded that she did not appoint. The plaintiff replied, that she by her will in writing, sealed and published in the presence of two witnesses, did will and appoint such sums to be paid; to which the defendant demurred, and judgment was given for the plaintiff. The argument seems to have been upon the

[348]

* Pl. 43.

† *Marriott v. Kinsman*.

pleading this writing as a will, and not as an appointment. But the Court held it to be sufficient, for though it was not properly a will, being made by a *feme covert*, yet it was a writing in the nature of a will.

Courts of law then had at this period recognized the power of a married woman, authorized by her husband, to make in effect a testamentary disposition of personal property.

The case of *Manby v. Scott*,* decided soon after the Restoration on an action which had been commenced during the usurpation of Cromwell, gave rise to a very large discussion of the rights of husbands and wives. It seemed then to be the opinion of the majority of the judges that the husband could not be sued for any debt contracted by the wife without evidence of his assent; consequently for no debt contracted by her when wilfully separated from him. HALE held the rule so strict, that in a case reported,† 2 Levinz, 16, some years after the judgment in *Manby v. Scott*, he nonsuited the plaintiff in an action brought by a gaoler against a husband for the diet and lodging of his wife. It appeared in the case that the husband had left his wife in the country and come up to London, where he married another woman. The former wife caused him to be indicted, and coming to London to prosecute, was, by his contrivance, arrested and sent to gaol. The husband was convicted on the prosecution. Yet HALE would not allow this peculiar case of the husband's procuring the arrest to be an exception to the rule, which required his assent to the debt. Subsequent cases, however, relaxed the extreme rigour of this rule, as where the husband turns the wife out of doors, he gives her credit wherever she goes, according to HOLT's opinion.‡ Salk. 118.§ But still in the case of a wilful separation of the wife, the law was understood to be, that the husband was not liable to be sued for her debts. It seems very certain that the judges who argued the case of *Manby v. Scott*, did not conceive that an action could be brought against the wife. It was equally the supposition of those who

1790.
COMPTON
v.
COLLINSON.

* 1 Lev. 5.

† *Calverly v. Plummer*.

‡ *Etherington v. Parrot*.

§ See *Harris v. Morris*, 4 Esp.

N. P. C. 41. *Liddlow v. Wilmot*,

2 Stark. N. P. C. 87. *Horwood v. Heffer*, 3 Taunt. 421, S. P. And see Freeman's Rep. in K. B. & C. P. 249, n. 2nd edit.

1790.

COMPTON
 v.
 COLLINSON.
 [349]

maintained that the husband was not chargeable, as of those who held the contrary, that the wife was incapable of having any property, could acquire no credit on her own account, and must either subsist on charity or starve, unless she could obtain an alimony from chancery or the ecclesiastical court. On the one side, this situation of the wife separated from her husband, is urged as a strong argument to support the conclusion that the husband is liable to an action for necessaries; while they who argue on the other side contend, that the distress in which the wife is placed is a just and expedient consequence of her separation from her husband, from which the law ought not to relieve her. It does not seem to have occurred to any of the Judges at that time that a wife, separated from her husband, may in fact possess property, that she will obtain credit by means of her apparent property, and that the consequence of her debts not being recoverable either against her or her husband, would only be prejudicial to the unwary, but honest tradesman.

The first case which appears, after this determination of *Manby v. Scott*, of an action brought against a married woman, is that of the Duchess of Mazarine, 1 Salk. 116; Lord Raym. 147; Comb. 402; in which the Court avoid the question, though she was holden liable to the action. The Reports say, it may be intended she was divorced, or her husband an alien enemy, and perhaps it may be like the *Lady Bellknap's* case, whose husband was exiled. The only notes of the case are very short, and the point appears to have been made upon a motion for a new trial, in which the Court felt what the justice of the case required, and were not pressed to explain the grounds of their opinion. It would however have been a strange situation if the Duchess of Mazarine, a woman enjoying a considerable fortune of her own, and for many years a large pension from the crown of England, had been protected from every legal demand, by a rule of the law of England that no action could be brought against her, because she had a husband whose person and fortune were utterly unknown, and could not be attached by any one with whom she dealt. The only two grounds hinted at for the decision could not have stood examination. She neither was, nor could be divorced, the law of France not permitting a divorce; and

though in the term when the motion for a new trial was denied, the treaty of peace had not been signed, and a Frenchman was then an alien enemy, yet that argument would not have been applicable in the next term. The question whether a married woman separated from her husband, and enjoying by his agreement a separate provision, shall be liable for her debts, has come before the Courts in several cases. In that of *Ringstead v. Lady Lanesborough*,* Hil. 23 Geo. III. the point was directly brought before the Court of King's Bench upon the record, and judgment given that she was liable. In that case the husband was stated to be out of England. But in Hil. 24 Geo. III.† the same question was brought before the Court, the husband being in England, and the same judgment given. In Mich. 26 Geo. III. the same question was again stated upon the record, in the case of *Corbet v. Poelnitz*,‡ with this difference only, that in that case the contract was for money, in the others, for goods; and the judgment was the same. About the same period, East. 16 Geo. III. the question was agitated in this Court; first, in the case of *Hatchett v. Baddeley*,§ where the CHIEF JUSTICE and my brother GOULD took a distinction on the pleadings, which neither stated a separation, nor a separate maintenance, but that the wife had eloped, and lived separately from her husband; which distinction has certainly great weight. But the two other judges held that the action would not lie merely on the ground of the defendant being a married woman. In East. 18 Geo. III. the question was again submitted to this Court, in the case of *Lean v. Schultz*,|| on pleadings which distinctly stated a separation, and separate maintenance; but the question itself then received no determination, the Court having given judgment merely on a point of form, namely, that the husband ought to have been joined for conformity.

From this state of the decisions, it cannot be concluded that it is a settled point, that an action may be maintained against a married woman separated from her husband by consent, and

1790.

COMPTON
v.
COLLINGS.
[350]

* Cooke's Bankrupt Law, 2nd Ed.
32.

† *Barwell v. Brooke's*, Cooke's
Bankrupt Law, 2nd Ed. 36.

‡ 1 Term Rep. B. R. 5.

§ 2 Black. 1079.

|| 2 Black. 1195.

1790.
COMPTON
v.
COLLINSON.

[351]

enjoying a separate maintenance.* But supposing the law to be according to the three last determinations of the Court of King's Bench, it seems to be a necessary conclusion, that a married woman, whose separate property consists of a copyhold estate, should have a power to surrender it, for otherwise the law would compel her to pay without allowing her to use the means of paying, and enable the creditor to recover a demand, without the power of making that demand effectual. This is certainly an argument from inconvenience alone, and therefore not altogether conclusive; but it has great weight when no possible inconvenience can be opposed on the other side. The interest of the husband is entirely out of the question; the interest of the lord is not hurt by the surrender; the expectancy of the heir is not an interest, and slight as it is, cannot be set up as a claim in justice, to take the estate without paying the debts.

But the main and substantial ground of the case is, that the wife is the tenant of the copyhold and not the husband; that the estate can be forfeited or surrendered only by her acts, not by his; that the authority which he acquires by his marital rights to direct and control her acts, is by his covenant in the present instance annulled, or at least suspended; and there is then no impediment to the validity of an act, passed in the court of the manor between her and the lord.

The certificate sent to the Court of Chancery, was as follows:

"Having heard counsel on both sides, and considered this question, we are of opinion, that John Willis took an estate to him and his heirs, according to the several customs of the manors of Banstead and Ryegate, under the surrenders and admittances of the 14th and 15th of July, 1772.

"LOUGHBOROUGH.

"H. GOULD.

"J. WILSON."

* It was subsequently decided, and was the rule until the Married Woman's Property Act, 1882, that such an action could not be main-

tained. Even in a suit in equity the husband had to be made a party.—
R. C.

BARKER AND COOK *v.* THE BISHOP OF LONDON,
LOMAX, AND BELLAMY.

1786.

[412]

(1 H. BL. 412—418.)

Reported from the MSS. of Mr. Justice BURNET.

C. P. MICH. TERM, 1786.

In a *quare impedit* brought against A. and B., tenants in common of an advowson, being assignees of coparceners, who do not agree to present, A. suffers judgment by default, and B. dies pending the writ. This judgment is a bar to another *quare impedit* brought by A. and C. the representative of B. (in which A. is summoned and severed), to recover the same presentation, but is not a bar to C.'s right to recover on the next avoidance in his turn.*

THIS was an action of *quare impedit* brought by Edward Barker and James Cook (in which James Cook was summoned and severed), against the Bishop of London, Caleb Lomax, and Daniel Bellamy his clerk.

The declaration stated [the title, by which it appeared that the plaintiffs Edward Barker and James Cook, were entitled to the advowson as tenants in common in one-third: two-thirds being Barker's, and one-third Cook's; and claiming that it belonged to the said James Cook and the plaintiff Edward Barker to present, but that the Bishop, Caleb Lomax and Daniel Bellamy, unjustly hindered them, &c.]

The Bishop claimed nothing but as ordinary, &c.

[414]

The defendant, Caleb Lomax, pleaded [(*inter alia* and) 3rdly]:

That in Michaelmas Term in the twentieth year of the reign of Geo. II. he brought a *quare impedit* in this Court against the Bishop of London, Daniel Crispin, clerk, James Cook, one of the plaintiffs to the present writ, and Edward Barker the father, [who was then entitled to one-third since devolved on the plaintiff Edward Barker] in his lifetime; and in Hilary Term, in the 21 Geo. II. by the consideration of the Court, recovered against the

* This case is reported in Willies's Rep. 659, and the point of it is thus stated by Mr. Durnford, in the margin:—"If A. and B., coparceners in an advowson, do not agree to present on a vacancy, A., the eldest (or her assigns), may present to the first turn,

and B. or her assigns to the next. And if when A. and B. do not agree, C. (a stranger) implead A. only by *quare impedit* on a vacancy, and recover, it is a bar to a *quare impedit* brought by B. against C. for that turn, though not for the next turn."

1786.

BARKER

v.
THE BISHOP
OF LONDON.

[415]

said James Cook his presentation to the said vicarage, by default of the said James Cook, and in the Easter Term following declared against the Bishop and Daniel Crispin, and had a verdict and judgment, and a writ to the Bishop to institute a fit person at his presentation : that his clerk, Daniel Bellamy, one of the now defendants, was admitted, instituted and inducted ; it was then averred that James Cook, Edward Barker the father, and the now plaintiff, and since the decease of Edward Barker the father, James Cook and the now plaintiff never did agree among themselves to present a fit person, wherefore he prayed judgment, &c.

* * * * *

To the third plea there was a general demurrer, in which the defendant joined.

This was argued upon the demurrer, by

[*Bootle*, Serjt., and at another day by *Prime*, Serjt., for the plaintiff, and by *Draper*, Serjt., and at another day, *Poole*, Serjt., for the defendant.]

[417] The COURT were unanimous in the following judgment :

If this had been the case of mere tenants in common, it would have been more doubtful, for the advowson in that case is one entire thing, not in its nature severable but by partition. There if one releases it shall enure to the benefit of the other. 5 Co. 97. So if two tenants in common be sued in a *quare impedit*, one makes default, and the other appears, if he hath judgment, he shall have a writ to the Bishop, though on default the plaintiff is entitled to a writ to the Bishop against him who made default. 2 Inst. 124, 125. So if two tenants in common sue in *quare impedit*, one is nonsuited, the other shall recover. Co. Litt. 197 b. But though these rules are laid down where two joint-tenants, or tenants in common, are parties as plaintiffs and defendants to the same suit, yet there is no case where one joint-tenant, or tenant in common, is sued or sues alone, and after a recovery against him, be it in chief or by default, and a writ to the Bishop, it hath been held that the other may sue with him, summon and sever him, and recover that very presentation. For

it should seem that as the presentation of one joint-tenant or tenant in common, will be a presentation in the right of all, so a recovery by default against one joint-tenant or tenant in common, will be a bar for that presentation to all. 2 Roll. Abr. Present. 372, pl. 1 et 2, 373, pl. 12. However then the case may be, with respect to mere joint-tenants or tenants in common of an advowson, it is clear as to the case of coparceners; though they may join in a *quare impedit*, yet upon their not agreeing to present, the law considers their right of presenting as severed by a partition to present by turns, as much as if they had actually made such a composition; therefore though tenants in common must join in *quare impedit*, coparceners need not.* 5 Hen. VII. 8, pl. 17. If they cannot agree, it is of common right that the eldest shall present on the first avoidance; the second on the second, the third on the third, and so on. 2 Roll. Abr. 346, pl. 1. This privilege goes to the issue or assignee in law, or in fact, of coparceners, such as the grantee, or tenant by the curtesy. 2 Roll. Abr. 346, pl. 2 and 3; Co. Litt. 166 b; Moore, 225. And if any of the coparceners be disturbed by the other, or their assigns, she may bring *quare impedit* against them. Suppose then a lapse incurs, where persons have a right to present by turns, it is held that only the right of the person who had then a right to present, shall be lost. Bro. Present. pl. 26. So, if there are four coparceners, the eldest and second present, a stranger usurps on the third; this usurpation will only affect that turn, and the fourth may present when his turn comes, and if disturbed bring *quare impedit*; for the usurpation only displaced the turn of the third. Bro. Qua. Imp. pl. 118. Suppose Cook had granted away his turn, would not his grantee be thereby entitled to his turn against Barker? And is there a stronger way of granting, than by suffering a judgment against him and execution for this turn by Lomax as is here done? Why is a usurpation against a bishop no bar to his successor, though it is to himself? Because by 1 Eliz.† a bishop cannot grant away such an advowson. Cro. Jac. 673; Sir W. Jones, 45 S. C., where a recovery without title by default, against a

1786.
BARKER
v.
THE BISHOP
OF LONDON.

[418]

* [Where such composition has been made, see Wats. Cl. Law, 254.]

† C. 19.

1786.
BARKER
v.
THE BISHOP
OF LONDON.

former Bishop of Ely, was held not binding on his successor. In this case therefore the recovery against Cook is to be considered as a grant of his turn, or a usurpation on his turn only, and therefore conclusive to Barker, who has no right to this turn, unless they had agreed to present, which is not averred, and not denied that they did not. This recovery therefore is peremptory for this turn, but will be no bar to Barker recovering the presentation at the next avoidance.

Judgment for the defendant.

C. P. EASTER TERM, 1790.

1790.
May 15.
[418]

ARTHINGTON AND HARDCASTLE v. THE BISHOP OF CHESTER AND JACKSON, CLERK.

(1 H. BL. 418—432.)

Where the grant of a rectory by the Crown contained an exception of all churches and vicarages thereto belonging, a perpetual curacy belonging to the rectory passed by the grant, not being included in the exception.

QUARE impedit. [The plaintiffs claimed a right of nomination; and at the trial a verdict was found for the plaintiffs, subject to the opinion of the Court on a case the material points of which appear by the judgment. The case was argued by *Laurence*, Serjt., for the plaintiffs, and by *Le Blanc*, Serjt., for the defendant; and the Court took time to consider.]

[428]

LORD LOUGHBOROUGH :

In this case, it is stated, that after the dissolution of religious houses the abbey of Coverham was demised by Ed. VI. to one Ward for 21 years, and that in the grant, after the demise of the rectory there is an exception of all woods, underwoods, and a demise of the advowson of the vicarage of the church of Coverham: that the reversion expectant on that term for years was sold by Queen Elizabeth to Allen and Freeman. The letters patent of Eliz. are set forth, which begin by reciting the former demise, and then the Queen grants the reversion of the rectory

with the appurtenances as before specified in the patent and the demise for years. After this, there is a grant of the whole rectory with a very ample description and all general words of grant, which concludes with granting it to Allen and Freeman in as full a manner as it was possessed by any abbot of Coverham. This undoubtedly grants expressly more than was contained in the terms of the demise to Ward, because it directly grants the woods and underwoods which were excepted out of the demise to Ward. It then mentions a grant of the rectory of Iford, in the county of Sussex; and at the close there is an exception of all advowsons of the rectories, vicarages, and churches belonging to the premises. The case goes on to state, that there was a vicarage belonging to the rectory of Iford, but none to the rectory of Coverham; but during the time the rectory of Coverham remained in the crown, an annual stipend of 5*l.* 6*s.* 8*d.* was paid by the crown to the curate. It is then stated, that Thomas Dickenson was admitted to the curacy in 1642 on the nomination of the grantees; that in 1691, one Oddie was licensed by the diocesan to serve the curacy; that afterwards one Turner was licensed in the same manner, and that the same Turner in 1708, was instituted to the rectory and vicarage of Coverham, on the presentation of Queen Anne by lapse. The case next states, that in 1727, on the supposed death of Turner, one Dickenson was instituted to the vicarage of Coverham, on the presentation of King George I., *pleno jure*; that afterwards Turner who was not dead, nor had made any avoidance of the living, appeared, and claimed the church, upon which Dickenson gave it up: that in 1737, one Lonsdale was nominated to the curacy by the impropiators, while Turner was in possession, who was afterwards dispossessed by process in the consistory court of Chester; and that by the death of Lonsdale there is now an avoidance.

On this case, the question for the determination of the Court is, what passed by the grant of Queen Elizabeth, to the persons under whom the present parties claim? for if all the interest in the rectory passed, the curacy which is incident to the rectory, (I rather call it incident than appurtenant,) undoubtedly passed along with it. It is contended on the part of the plaintiffs, that on the true construction of the grant no exception can be intended

1790.
 ARTHING-
 TON
 v.
 THE BISHOP
 OF CHESTER.

[429]

1790.
 ARTHING-
 TON
 v.
 THE BISHOP
 OF CHESTER.

of the curacy, and that if such exception had been inserted in the grant it would have been void as repugnant to the grant itself, because the rector of a rectory inappropriate where there is no vicarage endowed and no perpetual curacy, is obliged by law to find a curate to serve the church and give him a reasonable allowance. He may make the best terms he can, but that it is the duty of the bishop by ecclesiastical censures to compel the performance of the duty for the sake of the Church. That question would lead pretty far, but it is immaterial to enter into the consideration of it, if on a thorough view of the grant together with the facts of the case there is no reason to say that the curacy was excepted. That to us appears to be the true construction, and confirmed by the usage. The grant of Elizabeth begins, as I before stated, with a recital of the demise to Ward; but it would not be just to conclude that it meant to give no more. It is manifest that Ward had not all which the grantees afterwards had, because there is an express reservation in the demise to him of a part which they enjoyed. He was to have the profits of the rectory paying a rent of 20*l.* per annum during the term; but the transaction with Allen and Freeman was for an absolute sale at a large price paid. The grant does not stop short; it was necessary to recite the term because it was a grant in fee, and the purchaser under the crown acquired a right during the remainder of the term to the rent. It therefore begins with giving to the grantees the reversion after the term for years, and goes on in explicit and distinct words, granting this and all other commodities and emoluments whatever belonging to the rectory, parcel of the possessions of the abbot of Coverham; it mentions expressly the woods, underwoods, and trees, and closes a very long recital of the particulars with the words "in as ample a manner and form as any abbot of the abbey of Coverham had possessed and enjoyed the same." The general exception which follows was to prevent dilapidations, which were at that time very common to the destruction of churches. In the exception of the vicarage it is perfectly clear that the nomination to the curacy is not in terms included. Yet it is argued, that in a grant of the crown which is to be favourably construed, the Court would extend the meaning to a reservation of the nomination to the

curacy, if the words of the grant could justify that extension to be made. But the words of this grant hardly justify such an extension. If there had been an exception of the advowson of a vicarage specifically named in the grant of the rectory of Coverham, the argument would have had this ground to stand upon, namely, that something must be meant to be excepted, that as in reality (there being no vicarage at Coverham) the only nomination which could be made, was to the curacy, it must be implied that the curacy was meant, though improperly described as a vicarage. But that is not the case. The words in the grant are general and sufficiently answered, if there be a vicarage belonging to either of the livings. Now to one of the livings, to Iford, there is a vicarage belonging. That fully satisfies the words of the exception. They are not nugatory words, and it is not necessary in the construction of them that there should be an intention in the grant to make any exception whatever relative to the rectory of Coverham. Besides this, there are subsequent words in the grant which I think go pretty far to shew that this could not be the intention. For there is a provision on the part of the crown, to indemnify the purchasers from all burthens, charges, and rents which might be issuing out of the object of the grant, and a particular exemption from the payment of a pension of four shillings per annum, payable out of the rectory of Iford to the vicar. Now the nomination to that vicarage being intended to be reserved to the crown in the general mention which is made of all burthens issuing out of the things granted, the payment of this annual stipend to the vicar of Iford is particularly noticed. But there is no exemption from the payment of any allowance to be made to the curate. The effect therefore of the grant would be, according to the argument, to make the grantee of the rectory subject in the law to payment of the curate without giving him the power of nomination; and we should intend a reservation severing the nomination to the curacy from the fund out of which the provision for the curate must come. This would be certainly contrary to good policy and productive of mischief, by making it questionable who was to maintain the curate, and leaving the ecclesiastical Court destitute of means to compel such maintenance by sequestering the profits of the living. The curate also

1790.

ARTHING-
TON
v.

THE BISHOP
OF CHESTER.

1790.
 ARTHING-
 TON
 v.
 THE BISHOP
 OF CHESTER.

would be left without having any resort to the person by whom he was nominated, for a provision for his subsistence. It is too much therefore to contend, as the defendant does in this case, without special words, that a reservation should be made by intendment out of the general words of the grant when there is no part of the subject-matter, nor anything in the nature of the case, which would tend to induce such an intendment, and when reason and policy are against it. If this intendment were to hold, then the question would arise which my brother LAWRENCE argued with a great deal of force, but which it is not necessary now to enter into, whether such a reservation could be made? The usage, it is said, stands very loosely on behalf of the impropiators. But it is certainly in their favour. The first nomination of which there is an account, was made by the impropiators. How the next person was appointed does not appear. The nomination of Turner which followed, which is the first exercise of the right of the crown, is stated to have been by lapse, from which it is to be presumed that the crown had no original right to nominate. The next presentation of Dickenson in 1727 is still less in favour of the right of the crown, because it was clearly made on complete misinformation. There was no vacancy, no avoidance, and Turner had still the title to the living. It must have been made on a supposition either that he was dead, or that there was an avoidance by some other means. It was a presentation granted by the crown in a case which neither intitled the crown nor any one else. Turner appeared, and Dickenson gave up the church to him, and he resumed the possession. While Turner was so in possession, the impropiators nominated Lonsdale, and on a suit in the Consistory Court, the Bishop of Chester affirmed their right to nominate, and Turner was in consequence dispossessed, which would not have been if the right had been in the crown. All therefore that we know of the enjoyment of the right of nomination to this curacy from the time of the grant down to the present time is, as far as it goes, in favour of the plaintiffs, and there is no instance of a clear right of nomination on the part of the crown. It is for these reasons we are of opinion that there ought to be

[432]

Judgment for the plaintiffs.

C. P. TRINITY TERM.

BRAITHWAITE *v.* COOKSEY AND ANOTHER.

(1 H. BL. 465—468.)

1790.
June 22.

[465]

Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it; a distress may be taken for rent due for the whole term. [The possession of the administrator being the possession of the tenant within the statute of Anne.]

REPLEVIN for taking on the 13th of October, 1788, the goods of the plaintiff, an infant, who sued by *prochein amy*.

Avowry and cognizance. [To the effect that the demised premises had been held by one William Braithwaite for a term which expired (after his death) on 29th Sept. 1788; that Elizabeth Braithwaite his administratrix continued in possession during the remainder of the term and after the expiration of it; and that the distress was made for the rent due for the six years ending on 29th Sept. 1788.]

To this avowry and cognizance there was a general demurrer, in support of which *Clayton*, Serjt. argued in the following manner. At common law no distress could be taken after the expiration of the term. 1 Roll. Abr. 672; Co. Litt. 47 b. The statute 8 Anne, c. 14, gave a power to executors and others to distrain within six months after the determination of the term, and during the possession of the tenant. The avowant is in the nature of a plaintiff, and to entitle himself to enter must make a good title *in omnibus*. He ought to shew that the distress was taken during the possession of the tenant. Here William Braithwaite died before all the rent became due, for which the distress was taken. The case therefore is not within the terms of the proviso, nor within the spirit of it, as it would tend to this, that the succeeding tenant should be liable to be distrained for rent due from his predecessor, who was out of possession, and after six months had expired from the end of the term. * * *

[467]

Adair, Serjt., for the defendants:

The three principal statutes concerning distresses make these

1791.

BRAITH-
WAITE
v.
COOKSEY.

[468]

avowries good. The 32 Hen. VIII. c. 37,* enables the landlord to distrain against executors and administrators; † the 8 Anne, c. 14 ‡ to distrain within six months after the end of the term.

The Court were very clearly of this opinion, and therefore gave

Judgment for the defendants.

C. P. EASTER TERM.

1791.

May 15.

[627]

BARWICK v. READE.

(1 H. BL. 627.)

The full pay of a military officer cannot be assigned.

THE defendant, who was a lieutenant of marines, assigned his full pay to the plaintiff, in trust, first of all to pay and satisfy himself (the plaintiff) an annuity of 20*l.* per annum, and then to pay over the surplus to the defendant, and also gave a bond and warrant of attorney as a further security. In the last term a rule was granted to shew cause why the deed of assignment, bond, and warrant should not be given up to be cancelled on several grounds, the most material of which was, that the full pay of a military officer could not be legally assigned. When the motion was made, the Court intimated a very clear opinion that such an assignment was illegal, it being contrary to the policy of the law that a stipend given to one man for future services, should be transferred to another who could not perform them. However the rule was enlarged till this term, when on the motion of *Kerby*, Serjt., it was made absolute, no cause being shown, but the Court seeming to retain their former opinion. §

* S. 4.

† [This statute enables the executors of a landlord to distrain, but does not seem to apply to the present

case.]

‡ S. 6 & 7.

§ See *Lidderdale v. Duke of Montrose*, p. 375, *ante*; 4 T. R. 248.

MORGAN v. JOHNSON

(1 H. BL. 628—629.)

Service of notice of declaration on a Sunday, is bad, though the defendant accept it, knowing it to be irregular.*

1791.
May 16.
[628]

In this case notice of declaration was served on the defendant on Sunday, Feb. 6th, which he accepted, knowing at the same time it was irregular, as appeared by the affidavit of the attorney who served him with it. A rule having been granted to shew cause, why the declaration and all subsequent proceedings † should not be set aside on account of the irregularity, *Cockrell*, Serjt., shewed cause, arguing that the stat. 29 Car. II. c. 7, s. 6, directed, “that no person upon the Lord’s Day should serve or execute any writ, process, warrant, order, judgment or decree, &c.” but that service of notice was not within the provisions of the Act. In *Walgrave v. Taylor*, 1 Ld. Raym. 705, though Holt, Ch. J., was inclined to think that the Act intended to restrain all sorts of legal proceedings, yet the other judges held, that the delivery of a declaration was but *quasi* notice, and not process, and therefore good on a Sunday. And in Comb. 286 & 462, the Court held that the delivery of a declaration in ejectment on a Sunday was good.‡ But,

[629]

The COURT were clearly of opinion that the service of notice being on a Sunday was bad within the statute, and that the defendant could not by his acceptance waive the irregularity. Therefore the

Rule was made absolute,
on payment of half the costs, in pursuance of an agreement entered into by the parties, which was stated by affidavit.

* See observation of DENMAN, J. in *Oulton v. Radcliffe* (1874) L. R. 9 C. P. 189, 195, that this decision is founded on the illegality of the service on Sunday.—R. C.

† Judgment was signed for want of a plea, in the vacation after Hilary Term.

‡ But see *Walker v. Towne and Lee*, Barnes, 309, and the authorities cited in the margin of 1 Ld. Raym. 705, last edit. 8vo, which shew clearly that the Court, in the present instance, decided according to the known practice.

C. P. TRINITY TERM.

HAYNES *v.* HARE.

(1 H. BL. 659—665.)

1791.
July 13.

[659]

A. grants an annuity for his own life to B., to secure which, a bond and warrant are given, and judgment entered. B. dies. After his death, the Court will not admit evidence of a parol agreement between the parties that A. should be at liberty to redeem the annuity on certain terms (especially if it be the evidence of the attorney concerned), as a ground to order the securities to be given up, and satisfaction entered on the judgment.

THE facts of this case were as follow :—In July, 1780, Robert Hare, and Francis his son, in consideration of 300*l.* then paid to them by William Haynes, joined in a bond in the penalty of 600*l.* conditioned for the payment of an annuity of 50*l.* per annum to Haynes, his executors, administrators or assigns, during the life of Francis Hare. This bond was drawn in the usual form, without mentioning in the condition any agreement to redeem the annuity. A warrant of attorney was also given by the obligors to Haynes, to confess a judgment on the bond, and another warrant of attorney by Francis Hare, to enable Haynes to receive the annuity out of an allowance of 200*l.* per annum, which his father Robert Hare made him. Judgment on the bond was entered up in this court as of Trinity Term, 1780. Some time after Haynes died, and Francis Hare applied to his acting executor, for the purpose of redeeming the annuity, and tendered the principal sum, together with all arrears of the annuity and interest up to that time, amounting to 319*l.* 19*s.* This the executor refused to accept, alleging as a reason for his refusal, that his testator had specifically bequeathed the money arising from his annuities, and had given no power to the executors to redeem them : the executors therefore thought, that they could not safely consent to the redemption of the annuity in question, without the sanction of a court of law or equity. In consequence of this, Robert and Francis Hare preferred a petition to the Lord Chancellor (a bill being then depending in

[660]

Chancery respecting the will of Haynes) to redeem ; which was founded on the deposition of Richard Harborne (the attorney who transacted the business of the annuity between the two Hares and Haynes), stating, “ that he the deponent was first applied to by Francis Hare in July, 1780, to raise the loan of 300*l.* which he was unable to procure without better security than was offered : that Francis Hare being informed of this, directed him to raise 300*l.* by way of annuity on his (Hare's) life at six years' purchase, and said that he would get his father, Robert Hare, to join in the annuity bond, and himself give the purchaser a power of attorney to receive the annuity out of an allowance of 200*l.* per annum, which was made him by his father, but, that the annuity should be granted on the express conditions, that Francis Hare should at any time be at full liberty to pay off and discharge it on giving 14 days' notice of his intention, and that on payment of 300*l.* and interest up to the day of the discharge, the bond and all papers relating to the annuity should be given up to be cancelled : that in consequence of this direction, the deponent applied to Haynes to purchase the annuity, informing him at the same time of the conditions mentioned by Francis Hare, to which Haynes agreed : that when the bond and warrants of attorney were executed, the conditions were recapitulated, and again consented to by Haynes.” This was dismissed, on the ground of the mode of the application being improper, as the question could not be decided on a petition. They then filed a bill for the same purpose in Hilary Term, 1789, in answer to which the executors of Haynes denied all knowledge of any conditions to redeem the annuity ; and the cause afterwards coming on to be heard before Mr. Justice BULLER (who sat for the Chancellor) he dismissed the bill, on the ground that parol evidence could not there be received in contradiction to the annuity bond, but recommended an application to the Court in which the judgment was entered.

1791.

HAYNES
v.
HARE.

These proceedings having been had, a rule was granted in Hilary Term last, by this Court, for the executors of Haynes to shew cause why upon payment of the sum of 313*l.* 19*s.* the annuity should not be vacated, the bond and warrants of attorney

1791.
HAYNES
v.
HARE.
[661]

given up to be cancelled,* and satisfaction entered on the record of the judgment. This rule was obtained on an affidavit of Harborne, of the same purport as the deposition in Chancery above stated. It was afterwards enlarged till the present Term, when *Kerby and Bond*, Serjts., shewed cause. After stating and observing upon the particular circumstances of the case, they argued that it was a known principle of law, that matter *dehors* a deed could not be pleaded in contradiction of it. *Preston v. Merceau*, 2 Blac. 1249; *Meres v. Ansell*, 3 Wils. 275; *Lord Irnham v. Child*, 1 Brown, Rep. Chanc. 92; *Lord Portmore v. Morris*, 2 Brown, Rep. Chanc. 219. Here the agreement for redemption stated in the affidavit, is contradictory of the condition of the bond: the condition is for the payment of an annuity during the life of Francis Hare, but if the agreement takes place, the payment will be only during his pleasure. Though it is true, that there are many cases where matter may be pleaded which does not appear upon the face of the bond itself; such as duress, infancy, usury, gaming, stock-jobbing, and the like, yet in all those cases the averment goes to prove that the contract was originally void, and therefore that the instrument had no obligation from the beginning. *Collins v. Blantern*, 2 Wils. 347. But where a bond has once taken effect as a bond, it cannot be defeated by pleading a matter *dehors*, as is observed by EYRE, Ch. J., *Andrews v. Eaton*, Fitzgib. 76.

In support of the rule, *Adair and Runnington*, Serjts., contended, that this was not an application to alter a deed by matter *dehors*, but merely to prevent a judgment continuing in force contrary to the agreement of the parties. The Court has an equitable jurisdiction over its own judgments, and will inquire into the consideration on which they are founded; and it is the daily practice, if a judgment be entered up for a greater sum than is really due, for the Court to interfere and order satisfaction to be entered on the roll for so much. The question then is, whether they will not exercise that equitable jurisdiction in this case, according to the intent and agreement of the parties? And Haynes being dead, the next best evidence is that of

* Vide *Earler v. Gamson*, 4 B. & A. 286; *Storton v. Tomlins*, 2 Bingh. 475.

Harborne. Neither can there be any hardship on the executors, who may now sell the annuity, after it has run ten years, at the same price for which it was originally purchased.

Cur. advis. vult.

1791.
HAYNES
v.
HARE

On this day Lord LOUGHBOROUGH delivered the opinion of the Court. After stating the circumstances of the case, and the affidavit of Harborne, his Lordship proceeded thus :

Under these circumstances, the application was made to this Court, on the ground that the security being a judgment entered on a warrant of attorney, it was in its nature made under the sanction of the Court, that the Court had therefore a control over it, would examine into the consideration on which it was entered up, and not permit the party to avail himself of it, so as to receive more than in justice he is entitled to take. The case comes before the Court as it fitly and properly should, without any prejudice at all from what has passed in the Court of Equity. For the application to the Court of Equity was founded on circumstances very different from what might appear to this Court sufficient, on this species of application, for interposing by the authority, which it is necessary every Court should have, whose records are made matters of security, and inquiring into those securities which proceed on the assumption of a suit, which in fact was never brought. But when the Court is exercising its authority with respect to judgments entered, this principle is clear, that in judging of the transaction which is the foundation of the judgment, they will find themselves governed by the same rules which the law has prescribed, if the transaction itself independent of the judgment, were before the Court in the form of an action. We have not a greater latitude by having an authority over the judgment entered up, than in the decision of the question between the parties themselves. To be sure, there is a strong inclination arising in favour of the redemption in such cases, from circumstances which are pretty generally understood. The small value of the price paid for such annuities is, in general, governed by the probability, that when the party is in a situation to pay the money which has been fairly advanced, no obstruction or difficulty will occur in being permitted to redeem

[662]

1791.
HAYNES
v.
HARE.

[663]

on such terms as are here suggested. Another circumstance is, that the redemption is, in general, extremely advantageous to the party from whom the annuity is redeemed; because, if the price bears any proportion to the subject-matter, after the annuity has been paid a considerable time, it is less valuable than at the time of the original transaction, the life being so far spent. An idea has also prevailed, that the insertion of an express agreement to redeem might be dangerous to the security, and expose it to impeachment on the score of usury, by converting it in its appearance into a loan, and under those apprehensions (whether well or ill founded, it is not necessary now to consider) covenants for that purpose have not been inserted in the deeds.*

Notwithstanding all these circumstances, the Court feels itself in a situation, in the present case, in which it is impossible, consistently with the rules which have been wisely laid down, to permit the redemption and open the transaction. The person on whose part the judgment was entered up, is dead. The only evidence is the declaration of Harborne the attorney, that in all the general circumstances of the transaction, down to the final execution of the deeds between the parties, this condition for the redemption of the annuity was understood between them as perfectly agreed to. If Haynes were living, the Court, considering the affidavit of Harborne his attorney who had entered up the judgment for him, would be under no difficulty to call upon Haynes. If he made an affidavit and admitted the fact, there would be no difficulty to oblige him, as the plaintiff in the judgment, to comply with the terms of the agreement, or in other words to set aside the judgment, and compel him to accept the redemption. If Haynes denied it, and his affidavit denying the agreement asserted by the attorney were before the Court, I rather apprehend that the Court would find itself in a situation in which it could not move at all; there would be affidavit against affidavit. In a situation of this kind, I think it would be difficult for the Court to put the matter in any course of trial, in which Harborne's evidence would be suffered to overbalance Haynes's denial. If Haynes declined to make an affidavit, the Court would give credit to Harborne. But Haynes is dead, and then

* See *Murray v. Harding*, 3 Wils. 390.

the question is, whether the Court can permit terms not inserted in the deed which the parties have executed, to be added to the contract, of which this instrument is the full and explicit evidence. This brings me to the question which has been argued, whether on the testimony of a witness to a parol communication between the parties, a term can be added to the contract, which does not appear in the instrument by which that contract is established. Several cases have been cited on this subject. The case of *Lord Portmore v. Morris* does not apply to this. For the evidence* in that case, though extremely strong, was the evidence of persons not concerned for Rosoman: there Stubbs and Withy were both treating on behalf of Lord Portmore, and Jenkins likewise attended on his behalf: the attorney on the other side was Exley, and he positively denied what was as positively asserted in the depositions of the others. He gave an explicit contradiction to the paper in which Stubbs had entered a memorandum of the agreement.† Exley was not examined as a witness, but being a trustee of the annuity he was made a defendant in the cause, and against the denial in his answer it seemed difficult for the Court to have made any decree for the redemption, Rosoman being dead. But in the circumstances of these two cases there is an essential difference: here there is the testimony of Harborne the attorney for Haynes, as to the terms of redemption agreed upon between the parties. It is not necessary to cite any case to prove the proposition, that parol evidence of a parol communication between the parties ought not to be received to add a term, not inserted in the specific agreement which they have executed; and for this plain reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust, it would destroy all security and lay it open, unless the parties are com-

1791.

HAYNES

T.
HARR.

[664]

* The Court after the argument desired to have copies of the depositions in *Lord Portmore v. Morris* laid before them.

† This memorandum was dated on the day of the execution of the deeds, and signed by Stubbs, stating, that it was agreed by Lord Portmore

and Rosoman, previous to and at the execution of the deeds, that his lordship should, on payment of the 2000*l.* and half a year's annuity over and above that sum, have all the securities delivered up, and that the annuity should cease.

1791.
HAYNES
v.
HARE.

[665]

pletely bound by what they have signed and sealed. But it is said that, admitting the general rule, the particular circumstance of the testimony given by the attorney for the party forms an exception. The Court would certainly feel itself under no difficulty which way to act, if the party for whom Harborne was the attorney, were before the Court; but he being dead, and no discovery appearing to have been made by him, the circumstance of the attorney for the party being a witness, to invalidate the security against the representative of his employer, seems to be a strong confirmation of the general rule. There is nothing so dangerous as to permit deeds and conveyances after the death of the parties to them, to be liable to have new terms added to them, on the disclosure of the attorney in a matter in which he could meet with no contradiction. But this opinion is perfectly without prejudice to any application which may be made in the lifetime of the party. I give no opinion how far the Court might sanction such a requisition, on circumstances of this kind being disclosed. I wish to be understood as confining myself particularly to the mode of application, and to the evidence by which it is supported in the present case. The Court therefore must discharge the rule, but certainly without costs.

Rule discharged without costs.

1791.
July 13.
[665]

SILL AND OTHERS, ASSIGNEES OF SKIRROW A BANK-
RUPT, v. WORSWICK.
(1 H. Bl. 665—694.)

If after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of debt in England, by virtue of which he attaches, and receives, after the assignment, money due to the bankrupt in the West Indies, the assignees may recover the money in an action for money had and received.

ASSUMPSIT for money had and received to the use of the plaintiffs, with the usual counts. Plea, the general issue; which was tried before Mr. Justice Wilson at Lancaster, on the 27th of August, 1787, when a special verdict was found in substance as follows.

That William Skirrow on the 2nd of January, 1782, exercised the trade of a woollen draper at Lancaster; that he was then indebted to one James Pilkington, in 100*l.* and upwards, and on that day became a bankrupt; that on the 16th of January a commission issued on the petition of Pilkington, that on the 28th of January he was declared a bankrupt; that on the 5th of March an assignment was made of all his estates and effects, &c. to the plaintiffs: that before and when he became a bankrupt, he was indebted to the defendant Worswick in 230*l.* 17*s.* 7*d.* and that the said debt was contracted at Lancaster aforesaid, and at the time when it was so contracted and always afterwards both Skirrow and Worswick resided at Lancaster, which was their place of abode; that on the 4th of January the defendant Worswick, knowing that Skirrow had become a bankrupt, did verify and prove by affidavit in writing, before the Mayor of Lancaster that Skirrow was indebted to him the defendant in 230*l.* 16*s.* and upwards, for money lent, &c. That on the same day and year last aforesaid the said affidavit was certified and transmitted under the common seal of the said Borough of Lancaster, to one Thomas Moore and one Luke Tyson then being persons resident in the Island of St. Christopher, which said Island then and there, and before, and at the passing of a certain Act of Parliament made in the fifth year of the reign of our Sovereign Lord George the Second, intituled, “An Act for the more easy Recovering of Debts in his Majesty’s Plantations in America,” and on the 29th day of September which was in the year of our Lord 1782, was, and thenceforth hath been, and still is, one of the British plantations in America; that the defendant Worswick appointed the said Thomas Moore and Luke Tyson, so being resident in the said Island of St. Christopher, his attorneys to sue for, recover, and receive, of and from the said William Skirrow, or of, and from, all, or any of his factors, agents or consignees, in the British West Indies, all such sum and sums of money, debts, goods, chattels, and effects whatsoever, as were in any wise due, owing and belonging to him from the said William Skirrow.

1791.
SILL
v.
WORSWICK.

[666]

It was then stated, that Moore and Tyson having received the affidavit so certified and transmitted, and being so authorized by Worswick the defendant, did on the 6th of March, 1782, implead

1791.

SILL

v.

WORSWICK.

[667]

Skirrow in the King's Court of the Island of St. Christopher in a plea of trespass on the case, &c. for the recovery of the said sum of 230*l.* 17*s.* 7*d.* in which Skirrow was indebted to Worswick the defendant : that on the same day a writ of attachment grounded on the said plea according to the form of a certain law of the said island in that case made and provided, did, at the request of Worswick the defendant, duly issue out of the said Court of our said lord the king, by which said writ of attachment the provost marshal of our said lord the king, of the said island, or his lawful deputy, was commanded by our said lord the king to attach all and singular the goods and effects of the said Skirrow, in the said island, to answer to the said Worswick in his plea aforesaid : that on the 7th of March, 1782, the provost marshal did, according to the laws and customs of the said island attach divers sums of money as the proper monies and effects of the said William Skirrow (the bankrupt) in the hands of one Thomas Worswick the younger, who then and there was a merchant and resident in the said island of St. Christopher, within the jurisdiction of the said Court ; which said sums of money were the proper monies and effects of the said William Skirrow (the bankrupt) before and at the time when he became bankrupt as aforesaid, and were received before the time when he became bankrupt as aforesaid, in the said island by the said Thomas Worswick the younger, by the order, and to the use of the said William Skirrow (the bankrupt), and then and there, to wit, &c. did remain and were in the hands of the said Thomas Worswick the younger unaccounted for. It was afterwards stated that judgment was recovered in the Court of St. Christopher's and execution awarded, and that Moore and Tyson as attorneys for the defendant received on the 14th of May, 1783, the sum of 230*l.* 17*s.* 7*d.* from Thomas Worswick the younger, the garnishee ; that this money was remitted to and received by the defendant in England before the commencement of the present action ; that he was requested by the plaintiffs to pay it over to them, which he refused, insisting upon his right to retain the same, &c. and that he had not proved his debt under the commission, nor in any other manner received satisfaction for the same, except as aforesaid, &c. &c.

This was first argued in Easter Term, 1789, by *Lawrence*, Serjt., for the plaintiffs, and *Le Blanc*, Serjt., for the defendant.

1791.

SILL

v.

WORSWICK.

* * *

After these arguments, it was agreed, that the case should wait the determination of a similar one* then depending in the Court of King's Bench, which, it was understood, was to be argued before the twelve judges in the Exchequer Chamber.

But no such argument having taken place,† the case was argued a second time in this Court, in the present term, by *Adair*, Serjt., for the plaintiffs, and *Hill*, Serjt., for the defendant. * * *

Cur. adris. vult.

On this day Lord LOUGHBOROUGH, after stating the special verdict, proceeded in the following manner : [689]

The question is, whether the assignees of the bankrupt have a right to recover this money, as money had and received to their use ? The objection made to it is, that the money was recovered by process in the Island of St. Christopher, in which the bankrupt laws of England have no direct binding force. A variety of cases have occurred on this question ; and there is some confusion in the reports of them, which made a very deliberate consideration of it necessary. Not that I think it appears from the mere terms of the case itself, that the decision of this particular case could be attended with any great difficulty, or that any great question could arise out of it. The whole which has been argued has been as to the operation of the bankrupt laws in countries not subject to the jurisdiction of the courts of this country. In the present case, it is difficult for me to conceive that this question can arise out of the facts stated. For the

* *Hunter and Others v. Potts*, 4 Term Rep. B. R. 182, see p. 353, *ante*.

† But a case which was considered exactly similar to *Hunter v. Potts* came afterwards, to be decided in the Exchequer Chamber (on error from the K. B.), under the name of *Phillips v. Hunter*. In that case the

Court (*diss.* Eyre, C. J.), affirmed the judgment of the K. B. The report will be found at length in 2 H. Bl. 402. For the purposes of the Revised Reports, the principal case above reported, and the report of *Hunter v. Potts*, p. 353, *ante*, appear sufficient.—B. C.

1791.
SILL
v.
WORSWICK.

simple state of the case is no more than this. The defendant resident in England, and a creditor of Skirrow in England, has received money which was due to Skirrow in the island of St. Christopher at the time of his bankruptcy, and which at that time was subject to no lien whatsoever. The money being remitted to Worswick in England, and being clearly money which at the time of the act of bankruptcy was the property of the bankrupt, and subject to no lien whatever, he is, *primâ facie*, accountable for it to the assignees. The defence he makes is, that he recovered this money by legal process in the island; but he states also that the process was founded on an act done by him in England, and under the aid of the law of England. For the foundation of the recovery was an affidavit of debt made before the Mayor of Lancaster. Without that affidavit he could have instituted no proceeding in St. Christopher's; the money would have remained subject to the demand of the assignees whenever they had been apprised that such a debt was due, and had sent out proper powers. These propositions cannot be doubted. Then it is not a question whether the bankrupt laws have an operation at St. Christopher's, but whether they operated at Lancaster.

[690] It is a question, whether a creditor resident in England, subject to the laws of England, shall avail himself of a proceeding of that law to enable him to get possession of a debt from those who are entitled to that debt, and who have the distribution of it for the benefit of all the creditors, and to hold that possession against those creditors.

But the argument has gone into a more general consideration of the cases which have arisen under different circumstances, in which the bankrupt's property being dispersed abroad, or he himself having changed his residence, advantage has been taken of his local situation, or of the local situation of the property which has been attached. This leads me to a short consideration of the cases on this subject, in which I see no difference, if their circumstances are rightly understood and rightly applied. First, it is a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but

that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country. In the case of *Pipon v. Pipon*,* a party had possessed himself of a debt which was due to the intestate a subject of Jersey, and whose personal property was therefore governed by the law of Jersey. Lord HARDWICKE was applied to by his other relations resident in England, stating that they should be excluded from a share according to the distribution of Jersey, but that they should be entitled to a share according to the distribution of England; and they therefore prayed by their bill, that the administratrix might be restrained from taking the property to Jersey. Lord HARDWICKE very wisely and justly determined that he would not restrain the administratrix, he would not direct in what manner she was to dispose of the property or to distribute it. Having acquired the right to it, she was to distribute it according to the law which guided the succession to the personal estate of the intestate.

Personal property, then, being governed by the law which governs the person of the owner, the condition of a bankrupt by the law of this country is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well regulated justice, there is no doubt but it will give effect to the title of the assignees. The determinations of the courts of this country have been uniform to admit the title

1791.
SILL
v.
WORSWICK.

* Ambl. 25.

1791.

SILL

v.

WORSWICK.

of foreign assignees. In the two cases of *Solomons v. Ross** and *Jollett v. Deponthieu*,† where the laws of Holland, having, in like manner as a commission of bankrupt here, taken the administration of the property, and vested it in persons who are called curators of desolate estates, the Court of Chancery held that they had, immediately on their appointment, a title to recover the debts due to the insolvent in this country, in preference to the diligence of the particular creditor seeking to attach those debts. In those cases the Court of Chancery felt very strongly the principle which I have stated, and it has had a very universal observance among all nations. But it may happen, that in the distribution of the law in some countries, personal property may be made the subject of securities to a greater or less extent, and in various degrees of form. It is in those cases only that any difficulty has occurred. A question of this nature came before Lord HARDWICKE very largely in the bankruptcy of Captain Wilson. With the little explanation I am enabled to give of that case, in which the Court of Session entirely concurred with Lord HARDWICKE, the distinctions will be apparent. There were three different sets of creditors who claimed, subject to the determination of the Court, on the ground that Wilson had considerable debts due to him in Scotland. By the law of Scotland debts are assignable, and an assignment of a debt notified to the debtor, which is technically called an intimation, makes a specific lien *quoad* that debt. An assignment of a debt not intimated to the debtor gives a right to the assignee to demand that debt, but it is a right inferior to that of the creditor who has obtained his assignment and intimated it. By the law of Scotland also, there is a process for the recovery of debts, which is called an arrestment. Some of Wilson's creditors had assignments of specific debts intimated to the debtors, and completed by that intimation prior to the act of bankruptcy. Others had assignments of debts not intimated before the bankruptcy. Others had arrested the debts due to him subsequent to the bankruptcy, and were proceeding under those arrestments to recover payment of those debts. The determination of Lord HARDWICKE and that of the Court of Session entirely concurred. The first class I have mentioned,

* 1 H. Bl. 131.

† 1 H. Bl. 132.

namely, the creditors who had specific assignments of specific debts, intimated to the debtors prior to the bankruptcy, were holden by Lord HARDWICKE to stand in the same situation as creditors claiming by mortgage, antecedent to the bankruptcy. All therefore he would do with respect to them was, that if they recovered under that decree, they could not come in under the commission without accounting to the other creditors for what they had taken under their specific security. With respect to the next class of creditors Lord HARDWICKE was of opinion, and the Court of Session were of the same opinion, that their title, being a title by assignment, was preferable to the title by arrestment: and they likewise held, that the arrestments, being subsequent to the bankruptcy, were of no avail, the property being by assignment vested in the assignees under the commission. It is in this sense that an expression has been used by Lord MANSFIELD, in one or two cases, in which his language rather than his decision has been quoted with respect to the law of Scotland, namely, that the effect of the assignment under a commission of bankrupt was the same as a voluntary assignment. For so the law of Scotland treats it in contra-distinction to the assignment perfected by intimation, and to an assignment which the party might be compelled to make. But it does not follow that it is an assignment without consideration. On the contrary, it is for a just consideration; not indeed for money actually paid, nor for a consideration immediately preceding the assignment. In that respect, therefore, it is a voluntary assignment. But taking it to be so, it excludes and is preferable to all others attaching, it is preferable to all the arresters, it is preferable to all creditors who stand under the same class, and to all who have not taken the steps to acquire a specific lien till after the act of bankruptcy committed. In a variety of cases enumerated in Lord KENYON's opinion,* the same idea has prevailed, which I think is founded on the clearest and most evident principles of justice. If the assignees in this case had sent a person over to St. Christopher's to act for them, if they had given notice of the assignment, the Court of St. Christopher's ought unquestionably to have preferred the title of the assignees to the title of the creditor

1791.
 SILL
 v.
 WORSWICK.

[693]

* 4 Term Rep. B. R. 192; pp. 355—357, *ante*.

1791.
SILL
v.
WORSWICK.

using the process of attachment, because the law of the country, to which the creditor making the demand was subject, had, on a just consideration, vested that property in the present plaintiffs. As I take the determination in the Court of Chancery in the case of *Solomons v. Ross*, and the other case, to be founded, not on any policy or technical notions of the law of England, but on general law, preferring the title of the assignees to the title of the arresting creditor, the Court in *St Christopher's* ought also to have preferred the title of the assignees. When I have laid this down, it by no means follows that a commission of bankrupt has an operation in another country against the law of that country. I do not wish to have it understood, that it follows as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using), that a creditor in that country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided. But another case may possibly occur, of a suit brought against the bankrupt personally, and a case of this sort was stated in the argument, *Waring and others v. Knight*. I have not been able to get a particular account of that case. It is shortly stated in *Cooke's Bank. Law*, 372, that a person having committed an act of bankruptcy had gone over to Gibraltar, that a commission of bankrupt was taken out against him, and that the defendant brought an action against him in Gibraltar, and obtained judgment, and under the judgment payment of his debt. Whether the person was resident at Gibraltar prior to the bankruptcy, whether the debt was contracted at Gibraltar, whether he appeared to the commission in England, none of these circumstances are stated. But the decision would undoubtedly be very materially varied by those circumstances. Lord MANSFIELD held, that the defendant,

having recovered the debt against the bankrupt who was personally present at Gibraltar, was not answerable to the assignees for the money. I am told in one account of that case, that it turned on the form of the action. But this is clear, that there being no certificate, the defendant in that case had a right to sue the bankrupt. A bankrupt in this country without a certificate, may be sued; and though his goods could not be taken in execution, being vested in the assignees, yet his person might. There was therefore a good commencement of the suit against the person of the bankrupt at Gibraltar. How the debt was contracted, and how the suit was carried on, the report gives no account. However, it is at most but a decision at *Nisi Prius*, and is the only case which seems at all to stand against the current of authorities, which hold that the operation of the bankrupt laws, with respect to the personal property of the bankrupt, when that property is brought into this country by any one who has obtained it, is to carry a right to recover it to the assignees for the benefit of all the creditors. But, as I said before, it is not necessary to go the whole length of that discussion, because, on the circumstances of this particular case, the question is merely whether a creditor of the bankrupt resident in England, and knowing of the bankruptcy, shall avail himself of a process which he has commenced in England, so as to retain his debt from the assignees, and gain a preference over the other creditors. This is a proposition too clear to require any discussion. The consequence therefore is, that there must be

1791.
 SILL
 v.
 WORSWICK.
 [694]

Judgment for the plaintiffs.

INDEX.

ADMINISTRATION—Debts paid after decree.—Administratrix not allowed for debts paid after a decree to account; but shall stand in the place of the creditors paid. *Jones v. Jukes* 308

ADMINISTRATOR.—A submission to an award by an administrator is not an admission of assets. A promise by an administrator to pay the debts of the intestate, if there be no assets, is *nudum pactum*. *Pearson v. Henry* 523

ADVANCEMENT.—Copyhold granted to A. and B. his wife, and C. his younger son, to take in succession for their lives and the life of the survivors. The purchase money was all paid by A. C. is not a trustee of his life interest for A., but takes it beneficially as an advancement from his father. *Dyer v. Dyer* 14

ADVOWSON.—In a *quare impedit* brought against A. and B., tenants in common of an advowson, being assignees of coparceners, who do not agree to present, A. suffers judgment by default, and B. dies pending the writ. This judgment is bar to another *quare impedit* brought by A. and C. the representative of B. (in which A. is summoned and severed), to recover the same presentation, but is not a bar to C.'s right to recover on the next avoidance in his turn. *Barker v. The Bishop of London* 799

AGENT. See Principal and Agent.

AGREEMENT—Illegal—To pay share of annual profits of office. See Office.

— Effect of in equity. See Covenant.

ANNUITY—Redemption.—A. grants an annuity for his own life to B., to secure which, a bond and warrant are given, and judgment entered. B. dies. After his death, the Court will not admit evidence of a parol agreement between the parties that A. should be at liberty to redeem the annuity on certain terms (especially if it be the evidence of the attorney concerned), as a ground to order the securities to be given up, and satisfaction entered on the judgment. *Huynes v. Hare* 810

APPOINTMENT—Power of. See Settlement (Marriage), 1, 2, 3.

APPRENTICE.—An apprentice of seventeen years of age and upwards, bound by indenture (which stated her to be fourteen) for seven years, is entitled to be discharged at twenty-one. *Ex parte Mary Ann Davis* . . . 690

ARBITRATION—1. Award of umpire.—The Court will not set aside the award of an umpire because he received the evidence from the arbitrators without examining the witnesses, unless he were required to re-examine them before the making of his award. *Hall v. Lawrence* 470

— 2. Extent of award.—An award made upon a reference of all matters in difference between the parties, does not preclude the plaintiff from

suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred. *Ravee v. Farmer* 347

ARBITRATION—3. Impeachment of award.—Award upon a general reference cannot be impeached for erroneous judgment upon facts; but may for corruption, misbehaviour, excess of power, and mistake admitted by the arbitrators: in the three first cases there must be satisfactory evidence against them; for the Court favours awards.

Award contrary to law may be impeached; for that is excess of power.

Award not to be impeached for allowing compound interest; for it may be allowed in case of a contract for it either exprees or to be inferred from the nature of the dealings between the parties; as if it is according to the course of their trade; therefore it is a conclusion of fact, on which the judgment of the arbitrators is final; but this doctrine as to interest has no relation to mortgages.

Parties may, if they please, take arbitrators instead of a master. *Morgan v. Mather* 163

And see Administrator.

ASSIGNMENT. See Bankrupt; and Contract.

ATTACHMENT—Insufficient return to habeas corpus.—Return to a *habeas corpus* "I had not at the time of receiving this writ, nor have I since had the body of A. B. detained in my custody, so that I could not have her," &c., was held a bad return; and an attachment granted against the party who made it. An attachment may be granted for making an insufficient return to the first writ of *habeas corpus*, without issuing an *alias* and a *pluries* writ. *R. v. James Winton* 546

ATTORNEY. See Solicitor.

— Warrant of. See Infant, 2.

AUCTIONEER—1. An auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer, though the sale was at the house of such third person, and the goods were known to be his property. *Williams v. Millington* . . . 724

— 2. The verbal declarations of an auctioneer at the time of the sale are not admissible evidence to contradict the printed conditions. *Gunnis v. Erhart* 769

BAIL. See Evidence, 2.

BAILMENT—Gratuitous undertaking.—A. a general merchant, undertakes, voluntarily and without reward, to enter a parcel of goods of B., together with a parcel of his own of the same sort, at the custom-house for exportation, but makes the entry under a wrong denomination, whereby both parcels are seized. A. (having taken the same care of the goods of B. as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken) is not liable to an action for the loss occasioned to B. *Shiells v. Blackburne* 750

And see Carrier.

BAKER. See Sunday Trading.

BANKER—1. Bills deposited for general purpose.—If A. and B. have a general running account, consisting of bills drawn by B. on C. in

favour of A., and of bills and other securities deposited by A. with B., and upon the failure of B. and C., A. be obliged to take up the bills received by him from B., whereby the balance of the accounts is in favour of A., still he cannot maintain trover for the bills deposited by him with B., unless they were specifically appropriated to answer B.'s drafts on C. in favour of A., and deposited for that purpose expressly. *Bent v. Puller* . . . 654

BANKER—2. **Lien.**—A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect. This does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them in order to secure the payment of his general balance. *Davis v. Bowsher* . . . 650

BANKRUPTCY—1. **Attachment of money abroad.**—If, after the assignment of a bankrupt's estate, a creditor knowing it, and residing in England, attach the money of the bankrupt abroad, the assignees may recover it in an action for money received to their use. *Hunter v. Potts*. *Phillips v. Hunter* . . . 353

— 2. If after an act of bankruptcy committed, but before an assignment, a creditor of a bankrupt makes an affidavit of debt in England, by virtue of which he attaches, and receives, after the assignment, money due to the bankrupt in the West Indies, the assignees may recover the money in an action for money had and received. *Sill v. Worwick* . . 816

— 3. **Money sent to bankrupt to meet acceptances.**—A. and B. came to this agreement, that B. should purchase of A. all the light gold coin which he could send at a stated price, and that A. should from time to time draw upon B. for the money due upon such sale; and that B. should also from time to time accept other bills drawn by A. for his own convenience, for which A. was to remit value: after they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A. (not knowing of the bankruptcy), sent a parcel of light gold and bills, to enable B. to discharge the acceptances, which parcel was taken by B.'s assignees. A. afterwards discharges the acceptances. Under these circumstances B. is to be considered as the *factor* or *banker* of A., and as having only a *qualified property* in the goods and bills which were so sent for a particular purpose, the general property being in A. Therefore that purpose not being answered, A. may recover back from the assignees of B. the amount of those goods and bills. *Tooke v. Hollingworth*. *Hollingworth v. Tooke* . . . 573

— 4. A creditor under a joint and several bond may prove against both the joint and separate estate, but must make his election before a dividend. *Ex parte Bentley* . . . 36

BASTARD—1. **Custody.**—If the putative father of a bastard obtain the possession of her from her mother by fraud, the Court will order her to be restored to the mother. *R. v. Moses Soper* . . . 597

— 2. **Evidence.**—The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access. *Goodright d. Tompson v. Saul* . . . 409

— 3. **Maintenance.**—Where a bastard child is born in a parish for whose sustenance the parents neglect to provide necessaries, the parish officers are obliged to do it, without an order of justices for that purpose. *Hays v. Bryant* . . . 763

BILL OF EXCHANGE—1. **Alteration of date.**—An alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration. *Master v. Miller* 399

— 2. **Forged indorsement.**—In an action by the indorsee against the acceptor of a bill of exchange, drawn payable to "A. or order," it is competent to the defendant to give evidence that the person who indorsed to the plaintiff was not the real payee, though he be of the same name, and though there be no addition to the name of the payee on the bill. If a bill of exchange, payable to A. or order, get into the hands of another person of the same name as the payee, and such person, knowing that he was not the real person in whose favour it was drawn, indorse it, he is guilty of a forgery. *Mead v. Young* 314

— 3. A bond is given from A. B. and C. to D. reciting, that "A. having received from D. a certain sum of money in the East Indies, had drawn bills of exchange there payable to D. on a house in England, and that the obligors had agreed with D. if the bills should not be accepted and paid, that they would pay the amount thereof, with interest from the day of their respective dates by way of penalty;" with a condition to be void if the bills should be accepted and paid according to the tenor thereof. On non-payment of the bills, D. is entitled to recover no more than the amount of them, with interest from the time of their becoming due. *Orr v. Churchill*.
759

— 4. **Protest.**—By the common law, according to Mr. Justice Buller, the undertaking of the acceptor of a bill is to pay the bill on demand at any reasonable hour of the last day of grace. *Leftley v. Mills* 350

— 5. **Protest.**—In an action against the drawer of a foreign bill of exchange a protest for non-acceptance must be proved. *Gale v. Walsh* . . . 580

— 6. If separate actions be brought against the acceptor and indorsers of a bill, the Court will stay proceedings against any of the indorsers on payment of the bill and costs of that action; but not against the acceptor, without payment of costs in all the actions. *Smith v. Woodcock* . . . 500

And see Banker; Bankruptcy, 3; and Limitations, Statute of.

BOND—Surety.—B. as surety for A. became bound with him in a joint bond to C. and D. in a penalty of 180,000*l.*, with conditions for payment of 90,000*l.*, with interest at 5*l.* per cent. By a counter bond of the same date A. became bound to B. in a like penalty, with condition to save harmless, and indemnify the said B. his heirs, executors, &c., from payment of the said sum of 90,000*l.* and interest, and from all damages he might sustain for or on account of the non-payment of the said sum of 90,000*l.* and interest. After the deaths of A. and B. the executors of B. were called upon to pay, and actually did pay to C. and D. 22,000*l.* on account of the principal, and several large sums on account of the interest of A.'s debt. In a suit for the administration of A.'s estate, the Court allowed the executors of B. to come in as creditors for the several sums of money so paid by them, and for interest on the 22,000*l.*, but not for interest on the several sums of money paid by them to C. and D. for interest on the original debt. *Rigby v. Macnamara* 92

And see Bill of Exchange, 4.

CARRIER—1. **Destruction of goods by fire.**—A common carrier between A. and B. employed to carry goods from A. to B. to be forwarded to C. carried them to B., there put them in his warehouse, in which they were destroyed by an accidental fire before he had an opportunity of forwarding them; and held not answerable for the loss. *Garside v. The Trent and Mersey Navigation Co.* 468

CARRIER—2. Liability for goods destroyed by fire.—Common carriers from A. to B. charge and receive for cartage of goods to the consignee's house at B. from a warehouse there, where they usually unloaded, but which did not belong to them; they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allow all the profits of the cartage to another person, and that circumstance were known to the consignee. *Hyde v. The Trent and Mersey Navigation Co.* 620

CATTLE—Several pasture.—A. demised to B. the milk of twenty-two cows to be provided by A. and to be fed at A.'s expense on certain closes belonging to A.; A. covenanting that B. might turn out a mare, and that no other cattle should be fed there: held that the separate herbage and feeding of those closes passed to B., and that B. might distrain other cattle of A. doing damage there. *Burt v. Moore* 611

And see Common.

CERTIORARI—Power of Crown to remove by.—The general words of a statute which enacts that an indictment shall not be removed by *certiorari*, do not restrain the Crown from removing the indictment by *certiorari*; unless it appears on the face of the Act that the Crown should be bound by it. *R. v. Davies* 683

And see Criminal Law, 1; and Chapel.

CHAPEL—Annoying congregation. — An indictment found at the Quarter Sessions upon the Toleration Act 1 W. & M. c. 18, for disturbing a Dissenting congregation, may be removed into this Court by *certiorari* before verdict; and upon conviction of several defendants upon such indictment each is liable to the penalty of 20*l.* imposed by that statute. *R. v. Hube* 669

CHARITY—Administration.—In administering a charity, though a particular intention fails, the general intention shall be executed *cy pres*; therefore upon a trust for the vicars of P., provided they should be presented at the recommendation of the trustees, the trustees neglecting to recommend, the Chancellor, the presentation being in the Crown, presented: held, the vicar was entitled to the benefit of the trust. A declaration of uses by the founder of a charity presumed from an entry in an ancient book, purporting to be such declaration, but without signature or date; the book being kept by the trustees for entering their proceedings, and containing an order by the trustees, dated six years after creation of the trust, that the declaration of the founder be then entered as a direction to the trustees. *Attorney-General v. Boulbee* 265

CHEQUE. *See Donatio mortis causa.*

CHURCH. *See Pew.*

CHURCHWARDEN—Election—Validity.—The Court will not grant a *quo warranto* information to try the validity of an election to the office of churchwarden. *R. v. Shepherd* 416

COAL MINE—Liability of, to be rated to relief of poor. *See Poor Rate.*

COLLEGE—1. Right to appoint visitor.—In the case of a private eleemosynary lay-foundation, if no special visitor be appointed by the founder, the right of visitation, in default of his heirs, devolves upon the King, to be exercised by the great seal. On this ground the King is the

visitor of St. Catherine's Hall, Cambridge; and this Court refused to interfere by mandamus, to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election. *R. v. The Master and Fellows of St. Catherine's Hall* 369

COLLEGE—2. **Visitor**—**Appeal**.—If the visitor of a college in one of the universities refuse to exercise his visitatorial power by receiving and hearing an appeal, this Court will grant a mandamus to compel him; but if he has heard and decided on it, this Court has no authority to examine the legality of the judgment. The visitor need not hear parol evidence on such an appeal; it is sufficient if he receive the grounds of the appeal and the answer to it in writing. *R. v. The Bishop of Ely* 644

COLLIERY—Lease of. *See* Landlord and Tenant, 3.

COLLUSION. *See* Practice, 1; and Infant, 2.

COMMON—1. **Custom**.—A custom to take a profit in *alieno solo* is bad; such a right can only be claimed by prescription. *Grimstead v. Marlowe* 512

— 2. **Extent of prescriptive right**.—In an action of trespass in the common called A. it is competent to the defendant to shew that A. is part of a larger common or waste consisting of A. and B., and that he has a prescriptive right over the whole. Acts of user in B. may be evidence of the prescriptive right over the whole. *Morewood v. Wood* 349

— 3. **Surcharge**.—One commoner who has surcharged, may nevertheless maintain an action against another for surcharging the common. *Hobson v. Todd* 335

— 4. **To what appurtenant**.—Common for cattle levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land. *Scholes v. Hargreaves* 532

CONDITION PRECEDENT. *See* Covenant, 2.

CONTRACT—**Assignment**.—An assignment of a chose in action need not be by deed. *Howell v. Mac Ivers* 500

CONVEYANCE—**Presumption of**.—In the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining twenty-one, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than twenty years. In ejectment by landlord against tenants, whose lease is expired, the latter is not barred from shewing that his landlord's title is expired. *England v. Slade* 498

COPYHOLD—1. **Ancient services**.—If the lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant, by reason of the statute *Quia emptores*, must then hold of the superior lord. *Bradshaw v. Lawson* 429

— 2. **Surrender by married woman**.—Where a married woman lives apart from her husband under articles of separation, by which he covenants that she shall enjoy to her own use all such estates, both real and personal, as shall come to her during the coverture, and that he will join in the necessary conveyances to limit them to such uses as she shall appoint; and copyhold lands having afterwards descended to her, the husband again covenants in the same manner as before, and that he will join in surrendering such estates to such uses as she shall appoint; the wife may surrender the copyhold lands without the husband joining, and without a special custom for that purpose. *Compton v. Collinson* 786

COPYRIGHT—Assignee of print.—The assignee of a print may maintain an action on the stat. 17 G. III. c. 57, against any person who pirates it.

In such an action it is not necessary to produce the plate itself in evidence; one of the prints taken from the original plate is good evidence.

The date must always appear on the print. *Thompson v. Symonds* . 526

CORPORATION. See Recorder.

COSTS. See Practice.

COUNTY—Fine.—If a fine be imposed on a county, which the justices at the Sessions think illegal, they may order the treasurer to defray the expense of litigating the question out of the county stock. *R. v. The Inhabitants of Essex* 470

COVENANT—1. Effect of in equity.—Covenant to set apart and pay annual profits of land is in equity a lien on the land against the covenantor and claimants under him with notice.

Agreement concerning any subject, though in form personal, raises a trust in equity against the party himself, volunteers, and claimants with notice under him; except where the effect would be to restore the power of violating it, as where tenant in tail has suffered a recovery contrary to his covenant. *Legard v. Hodges* 146

— 2. Breach of.—Where mutual covenants go to the whole consideration on both sides, the performance of the one is a condition precedent for the exaction of the other. It is different where a breach of one of the covenants may be compensated in damages. *Boone v. Eyre* 768

And see Landlord and Tenant, 2, 3.

CRIMINAL LAW—1. Certiorari.—The party prosecuting a *certiorari* to remove a conviction, &c. must himself enter into a recognizance with other persons to prosecute it with effect, &c., by the 5 Geo. II. c. 19, s. 2. A *certiorari* to remove a conviction must, by 13 Geo. II. c. 18, s. 5, be applied for within six months after the date of such conviction. *R. v. Boughey* 381

— 2. Practice.—An information filed by the Attorney-General against an East Indian delinquent under 24 Geo. III. c. 25, as amended by 26 Geo. III. c. 57, to which the defendant demurred, may be amended in B. R. upon the motion of the Attorney-General. *R. v. Holland* 439

— 3. Postponement of trial.—A criminal information having been granted against the defendant, he, before the trial at *nisi prius*, distributed handbills in the assize town, vindicating his own conduct, and reflecting on the prosecutor's; this matter being disclosed to the Judge at *nisi prius* by an affidavit, was held a sufficient ground to put off the trial.—And that affidavit being returned to this Court, they granted another information on it against the defendant; considering the affidavit, taken at *nisi prius*, as taken under the authority of this Court. *R. v. Jolliffe* 383

— 4. Disobedience to order in council made by authority of statute is misdemeanor though the statute prescribe no penalty. *R. v. Harris* . 358

And see Bill of Exchange, 2.

CROWN—Power to remove indictment by Certiorari. See Certiorari.

CURATE—Non-residence.—A curate of an augmented curacy by Queen Anne's bounty is not liable to the penalties of the 21 H. VIII. c. 13 for non-residence. *Jenkinson v. Thomas* 493

CUSTOMS—1. Goods not liable to seizure.—If a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in action for money had and received. In such an action a month's notice need not be given under the 23 Geo. III. c. 70, s. 30. *Irving v. Wilson*. . . . 444

— 2. Smuggled Goods—Recovery of value by vendor.—An inhabitant of Guernsey cannot recover in the Courts of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into England, and gave him assistance for that purpose. *Clugas v. Penaluna*. 442

CY PRES—Doctrine of. See *Charity; Settlement (Marriage)*, 3.

DEED—1. Assignment of chose in action need not be by. See *Contract*.

— 2. Execution by one partner by authority and on behalf of another.—If A. execute a deed for himself and his partner, by the authority of his partner and in his presence, it is a good execution, though only sealed once. *Ball v. Dunsterville*. 394

And see *General Words*.

DISABILITY. See *Limitation, Statutes of*.

DISTRESS. See *Landlord and Tenant*, 5, 6, 7.

DONATIO MORTIS CAUSA.—An absolute gift, to take effect immediately, cannot be considered as *donatio mortis causa*; therefore such gift of a common cheque on a banker, payable to bearer, and of a promissory note, held not to be *donatio mortis causa* or an appointment or disposition in nature of it; and not capable of any greater effect in equity than at law. *Tate v. Hilbert*. 175

ELECTION. See *Recorder; and Married Woman*, 2.

ESTATE POUR AUTER VIE.—If an estate *pour auter vie* be limited to a man, his heirs, executors, administrators and assigns, and be not devised, it descends to the heir as a special occupant. *Atkinson v. Baker* 366

ESTATE-TAIL.—In order to discontinue an estate-tail, it is necessary that the party discontinuing should be actually seized by force of the entail. *Driver v. Hussey*. 767

And see *Will*, 19.

EVIDENCE—1. Entries by deceased person.—Where the right to the soil is in issue, entries written by the steward of a former owner from whom title is derived are admissible evidence, if the steward be dead. *Barry v. Bebbington*. 450

— 2. Cross-examination to character.—A witness may be asked whether he has not been in the pillory for perjury. *R. v. E. Edwards* 427

And see *Solicitor; and Landlord and Tenant*, 9.

EXECUTION—Priority.—If goods be taken in execution on a *fi. fa.* against the king's debtor and before they are sold, an extent come at the king's suit grounded on a bond debt tested after the delivery of the *fi. fa.* to the sheriff, these goods cannot be taken upon the extent. *Rorke v. Dayrell*. 417

EXECUTOR—1. Executor, who has not proved, not considered as acting, by assisting a co-executor who had proved in writing letters to collect debts.

Nor by writing directly to a debtor of the testator, and requiring payment. *Orr v. Newton* 44

— 2. Goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right. *Farr v. Newman* 479

— 3. Title of, to unbequeathed residue. *See Will*, 35.

FEES. *See Physician.*

FENCE.—An action on the case for not repairing fences, whereby another party is damaged, can only be maintained against the occupier, and not against the owner of the fee, who is not in possession. *Cheetham v. Hampson* 397

FERRY—Exclusive right to.—If there be an exclusive ferry from A. and B. it does not prevent persons from going by any other boat from A. directly to C., though it lie near to B., provided it be not done fraudulently, and as a pretence for avoiding the regular ferry. *Tripp v. Frank* 495

FINE. *See County.*

FOREIGN STATE—Confiscation of property of British subject by—*See International Law.*

FRANCHISE—*Quo warranto.*—There must be an user as well as a claim of a franchise in order to found an application for an information in nature of a *quo warranto*. Stating that the defendant who was elected to an office had tendered himself to be sworn in is not sufficient. *R. v. Whitwell* 545.

FRAUDS, STATUTE OF—1. Guaranty for price of goods.—A tradesman delivers goods to A. at the request and credit of B., who says, before the delivery, "I will be bound for the payment of the money as far as 800*l.* or 1,000*l.*" This promise of B. not being in writing, is void by the Statute of Frauds, if it appear that credit was given to A. as well as B. *Anderson v. Hayman* 734

— 2. Parol agreement to convey.—Agreement by parol that upon plaintiff's procuring a release of right from a stranger defendant would convey. Plaintiff procures the release by paying a valuable consideration. This is not a part performance, and the Statute of Frauds may be pleaded to a bill for specific performance of such an agreement. *O'Reilly v. Thompson* 41

GENERAL WORDS.—A deed of release of a house, mill and lands called Clock Mills, and "all lands, &c., belonging, used, occupied, and enjoyed, or deemed taken or accepted as part thereof," &c., will pass leasehold lands which have been occupied with, and are reputed part of Clock Mills, as well as freehold, especially against the releasor. *Doe d. Davies v. Williams* 703

GLEANING.—No person has, at common law, a right to glean in the harvest field. Neither have the poor of a parish legally settled (as such) any such right. *Steel v. Houghton* 711

HABEAS CORPUS. *See Attachment.*

HALF-PAY. *See* Officer, 2.

HIGHWAY—Repair.—If a parish be situate part in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of that part only is bad. The indictment must be against the whole parish. *R. v. The Inhabitants of Clifton* . 657

IMPRESSMENT—Exemption.—A sea-faring man, serving the office of headborough, is not thereby exempted from being impressed. *Ex parte J. Fox* 596

INDICTMENT. *See* Malicious Prosecution, and Order in Council.

INFANT—1. Fraud of.—A woman at the time of her marriage was indebted on two promissory notes. After the marriage, the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit the husband pleaded his infancy at the time of giving the bond. On a bill filed in this Court for relief, the Court ordered the notes to be returned to the plaintiff with directions that the defendant should not plead the statute of limitations to any action the plaintiff should bring on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given. But this Court will not order the immediate payment of the money. *Clarke v. Cobley* 25

— **2. Warrant of attorney.**—A warrant of attorney given by an infant is absolutely void, and the Court will not confirm it, though the infant appear to have given it (knowing that it was not valid) for the purpose of collusion. *Saunderson v. Marr* 723

And see Limitation, Statutes of.

INNKEEPER—Liability for goods of guest.—If an innkeeper refuse to take charge of goods till a future day because his house is full of parcels, still he is liable to make good the loss if the owner stop as a guest, and the goods be stolen during his stay. *Bennett v. Mellor* 598

INSURANCE (MARINE)—1. Barratry of master.—In an action by the assured of goods against the underwriters for a loss by the barratry of the master, proof that the person who was described in the policy as master, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, is *primâ facie*, sufficient. And where the voyage insured was from Jamaica to New Orleans, which lies up the river Mississippi, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor and went up the river in his boat for a fraudulent purpose of his own, held that the dropping of his anchor with such fraudulent intent was an act of barratry. *Ross v. Hunter* 319

— **2. Provisions for use of crew.**—Provisions sent out in a ship for the use of the crew for the intended voyage, are protected by a policy of assurance on the ship and furniture. *Brough v. Whitmore* 361

— **3. Seizure of ship by armed mob.**—If an armed force board a ship, and she becomes stranded, and part of the cargo (consisting of corn) is taken by the mob at their own price, it is *not* a loss by pirates, or by restraint of princes “and people,” nor can the loss be recovered, as for a general average: but for such part as in consequence of the stranding was damaged and thrown overboard, the insured may recover on a count stating the loss to be by stranding. *Nesbitt v. Lushington* 519

INTEREST.—A power to charge a sum in gross implies a power to give any rate of legal interest; and the rule of the Court to give 4 per cent. applies only where no rate is specified by the party having power to fix it. *Lewis v. Freke* 301

INTERNATIONAL LAW—Debt due to British subject whose property is afterwards confiscated by Foreign State.—Before the Declaration of Independence, a bond for borrowed money was made by B. in favour of A., both British subjects in America. Subsequently and during the war the State of New York confiscated the property of A. (then a resident there), as an adherent of the enemy. After the Treaty of Peace A. brought an action of debt on the bond in the English Court of Common Pleas. Held that he could recover:—By the Common Pleas, on the ground that an act of confiscation by a Foreign State is no bar to a transitory action in an English Court; by the King's Bench, on the ground that the Treaty of Peace did not relate back so as to validate the act of confiscation; which therefore could not, in an English Court, be regarded as having any authority. The judgment of the C. P., so affirmed by the K. B., was again affirmed by the House of Lords. *Folliott v. Ogden. Ogden v. Folliott* . 736

INTERROGATORIES. See Practice, 5.

JUDGMENT—Leave to enter.—Where judgment has not been entered within a year and a day, on a warrant of attorney given with a post-obit bond, and the obligee does not apply to the Court for leave to enter it till after the death of the person on whose death it is payable, the Court will not grant leave without a rule to shew cause. *Lushington v. Waller* . 727

LANDLORD AND TENANT—1. **Adverse claims.**—Tenant cannot file a bill of interpleader against his landlord on notice of ejectment by a stranger under a title adverse to that of the landlord. On suspicion of collusion an inquiry into the circumstances was directed; and the report confirming the fraud, the bill was dismissed with costs to the landlord, as between attorney and client, to be paid by the plaintiff and his solicitor; the latter to shew cause why he should not be struck off the roll. *Dungey v. Angove* . 217

— 2. **Covenant.**—A person who enters into an express covenant in a lease, continues liable on his covenant although the lease is assigned over. *Auriol v. Mills* . 341

— 3. **Covenant.**—In an indenture of lease of a colliery, the two lessees covenanted jointly and severally with the lessor in manner following, viz., &c.; then followed a string of covenants in respect to the working of the colliery, wherein the lessees covenanted jointly and severally; and then came a covenant, that the monies appearing to be due should be accounted for and paid by the lessees, their executors, &c. (not saying and each of them): held this as well as the former covenants were several as well as joint, by reason of the introductory words. *The Duke of Northumberland v. Errington* 668

— 4. **Custom.**—A custom that a tenant may leave his away-going crop in the barn, &c., of the farm, for a certain time after the lease is expired, and he has quitted the premises, is good, and the landlord may distrain the corn so left, for rent arrear, after six months have expired from the termination of the term. *Beavan v. Delahay* . 696

— 5. **Distress for rent.**—Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it; a distress may be taken for rent due for the whole term. The possession of the administrator being the possession of the tenant within the statute of Anne. *Braithwaite v. Cooksey* . 807

— 6. **Distress—Implements of Trade.**—Implements of trade may be distrained for rent, if they be not in actual use at the time, and if there be no other sufficient distress on the premises. *Gorton v. Falkner* . 463

— 7. **Distress—Payment of rent—Notice.**—A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it; and if he do, the other tenant in common may distrain for his share. *Harrison v. Burnby* . 584

LANDLORD AND TENANT—8. **Holding over from remainder-man.**—Tenant for life makes a lease for years, to commence on a certain day, and dies (before the expiration of the lease) in the middle of a year. The remainder-man receives rent from the lessee (who continues in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease. This is evidence, from which the Court will presume an agreement between the remainder-man and the lessee, that the lessee should continue to hold (as a yearly tenant) from the day, and according to the terms of the original demise, so that notice to quit ending on that day is proper. *Roe d. Jordan v. Ward* 728

— 9. **Impeaching landlord's title.**—In an action for use and occupation by an incumbent against a tenant of the glebe lands, who has paid him rent, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title. *Cooke v. Loxley* 521

— 10. **Notice to quit.**—A distress taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice. *Zouch v. Willingale* 770

— 11. **Notice to quit.**—Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice. *Jones v. Mursh* 441

— 12. **Parol lease.**—If a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the statute of frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore, the landlord can only put an end to the tenancy at Candlemas. *Doe d. Rigge v. Bell* 642

— 13. The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in an husband-like manner. *Powley v. Walker* 614

LAND-TAX—1. **Assessment.**—Houses, built on lands embanked from the Thames, in pursuance of 7 Geo. III. c. 37, which vests those lands in the owners, free from taxes, are not liable to be assessed to the general land-tax imposed by 27 Geo. III., though such Act is conceived in general terms, and is subsequent in point of time to the Act creating the exemption. *Williams v. Pritchard* 310

— 2. **Assessment.**—A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not assessable to the land-tax. *Harrison v. Bulcock* 718

LEGACY. See Will, 21—26.

LIBEL—Against dead person.—An indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred of the King's subjects against them, and to excite his relations to a breach of the peace, cannot be supported. *R. v. E. Topham* 343

LICENSE. See Magistrate.

LIEN. See Banker; Covenant, 1.

LIMITATION, STATUTES OF—1. If one plaintiff be abroad, and the others in England, the action must be brought within six years after the cause of action arises. *Perry v. Jackson* 452

LIMITATION, STATUTES OF—2. When once the five years allowed to an infant to make an entry for the purpose of avoiding a fine, begin, the time continues to run, notwithstanding any subsequent disability. The same principle applies as to disability under all the statutes of limitations. *Doe d. Duroure v. Jones* 390

LUNATIC—1. **Estate of—Management.**—Timber on estate of lunatic cut under order of Court, sold, and produce paid into the bank on account of the lunatic; after his death on petition by his heir for the money Lord Chancellor was of opinion, that the Court may do it for lunatic's benefit, but only on pressing occasions; that when property is converted, equity will recall it for the representative, if done by breach of trust, not if by accident, the Court, or the tort of a stranger; but on account of its consequence and difficulty of reversing order made on petition, refused to give it to either representative without a bill.

Waste in the statute providing for lunatics means destruction, not that, from which tenant for life impeachable is restrained. *Ex parte Bromfield*. 126

— 2. There is no equity between the real and the personal representatives after the death of a lunatic to have property, which was altered by the Court, restored; therefore the produce of timber on the estate of a lunatic cut and sold by order on report, that it would be for his benefit, is personal assets.

Real and personal representatives, being equally volunteers, must take what they find at the death of the person entitled for life in the condition, in which they find it: there is no equity upon the subject.

The statute of lunatics does not introduce any new right in the Crown. The words "waste and destruction" in it are to be construed in the ordinary, not the technical sense.

Where timber makes part of the general rental of an estate, in case of lunacy it would be a breach of duty not to manage it in the usual manner.

Under the statute the Crown commits the care of lunatics to some great officer; not of necessity the Chancellor.

The warrant confers no jurisdiction; but only a power of administration.

The appeal is to the King in Council.

In managing the estate of a lunatic the general principle is to attend solely to the interest of the owner without any regard to the succession.

In administering the estate of a lunatic the Chancellor may apply personal estate in payment of debts to any extent; and is to take every advantage, that tends fairly towards ordinary improvement, considering only the immediate interest of the proprietor; but consistently with that alteration of property is as far as possible to be avoided; and great care must be taken, that nothing extraordinary is attempted, as purchasing estates, disposing of interests, engaging in adventures, &c.

If a bailiff cuts timber without authority, and before it is sold the party dies, it is personal assets, and the heir has no action against the personal representative; nor is there any equity between them on the subject. *Oxenden v. Lord Compton* 131

MAGISTRATE—License—Jurisdiction.—Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale licenses, their jurisdiction attaches, so as to exclude the others appointing a subsequent meeting; but they may all meet together on the first day; but if, after such appointment, the other set of magistrates meet on a subsequent day and grant other licenses, their proceeding is illegal, and the subject of an indictment. *R. v. Sainsbury* 433

MALICIOUS PROSECUTION.—An action lies for a malicious prosecution, though the plaintiff be acquitted on a defect in the indictment. *Wicks v. Fentham* 374

MANOR. See Copyhold.

MARRIED WOMAN—1. **Acknowledgment.**—Wife examined on commission apart from husband as to the disposition of money devised to be laid out in land for her in tail, reversion to her in fee, whether to be received in money or laid out as directed. *Binford v. Bauwden* . . . 162

— 2. **Election.**—Husband devised all his real and personal estates in trust for his wife for life, provided she should not marry; and made her executrix. The trustees not acting, she took possession. After receiving rents and profits for five years not allowed to elect to take a sum under marriage settlement, without special ground, as that from the situation of the property it was doubtful, what would be the result.

Party having right of election may file a bill to have property cleared in order to elect to advantage. *Butricke v. Broadhurst* . . . 100

And see Copyhold.

MORTGAGE—1. **Equitable.**—The delivery of title deeds to an attorney to prepare a mortgage deed does not amount to an equitable mortgage; otherwise, if deposited expressly as a security for a debt. *Ex parte Bulteel* . . . 39

— 2. **Redemption.**—A purchaser of an equity of redemption filed his bill against the mortgagee to redeem. The original mortgagor having made a mortgage of other premises to the same mortgagee for a distinct debt, the purchaser cannot redeem the first, without redeeming the second mortgage. And the parties interested in the equity of redemption of the second mortgage are necessary parties to the suit. *Ireson v. Denn* . . . 97

— 3. **Of ship.** See Ship, 2.

NEWSPAPER, evidence of publishing. *R. v. Topham* . . . 343

NUISANCE, right to abate. See Trespass, 1.

OFFICE—1. **Corrupt agreement as to profits of.**—A. being possessed of an office in a dockyard, B. in order to induce him to procure himself to be superannuated, and retire on the usual pension, agrees (without the knowledge of the Navy Board to whom the appointment belongs) in case B. should succeed him, to allow him a certain annual share of the profits of the office. B. is appointed but does not perform the agreement. A. can maintain no action on the agreement. *Parsons v. Thompson* . . . 773

— 2. **Illegal agreement to secure appointment to post in Customs.**—A. by the interest, and on the application of B., is appointed customer of a port, having previously signed an agreement declaring that his name was used in the application in trust for B., that he would appoint such deputies as B. should nominate, and would empower B. to receive the profits of the office to his own use. On the failure of A. to comply with the agreement, no action upon it will lie against him. *Garforth v. Fearon* 778

OFFICER—1. The full pay of a military officer cannot be assigned. *Barwick v. Reade* . . . 808

— 2. The future half-pay of an officer is not assignable. *Lidderdale v. The Duke of Montrose* . . . 375

ORDER IN COUNCIL—**Infringement of.**—The 26 Geo. II. c. 6, s. 1, enacts, that all persons going on board ships coming from infected places shall obey such orders as the King in council shall make, without annexing any particular punishment; the disobedience of such an order is an indictable offence, and punishable as a misdemeanour at common law. *R. v. Hurris* 358

PARISH. See Highway.

PARTITION.—See Vendor and Purchaser, 5.

PARTNER—Power to execute deed on behalf of co-partner. *See* Deed.

PARTNERSHIP—1. **Account**.—One partner retired; the others continued in partnership, and failed; in the interval large sums were paid to him, who retired, in respect of a balance due to him on account: under the bill of the assignees of the last partnership upon circumstances of fraud an account was decreed against the partner, who retired, with respect to the period of the last partnership, and refused as to the previous time. *Anderson v. Maltby* 206

— 2. **Acts of partner**.—In general, a partnership is bound by the acts of an individual partner in such cases only as in the usual course of dealing are referable to the partnership concerns. *Ex parte Agace* 49

— 3. **Joint adventure**.—A. B. C. and D. enter into an agreement to purchase goods in the name of A. only, and to take aliquot shares of the purchase; but it does not appear that they are jointly to resell the goods. On failure of A. the ostensible buyer, B. C. and D. are not answerable to the seller as partners with A. *Coope v. Eyre* 706

PERPETUITY. *See* Settlement (Marriage), 3.

PEW—Possession.—Uninterrupted possession of a pew in the chancel of a church for thirty years is presumptive evidence of a prescriptive right to the pew in an action against a wrong-doer; but that presumption may be rebutted by proof that the pew had no existence thirty years ago. *Griffith v. Matthews* 598

PHYSICIAN.—A physician cannot maintain an action for his fees. *Chorley v. Bolcot* 395

POOR-RATE—1. **Lessee of coal mine**.—The lessee of a coal mine is liable to be rated to the relief of the poor though he derive no profit from the mine. *R. v. Parrot* 672

— 2. **Publication in church**.—If a poor-rate be not published in the church on the Sunday next after, it is a nullity; and payment under it cannot be enforced, though there be an appeal to the Sessions, which was dismissed. *R. v. Newcomb* 414

POST-OBIT.—A post-obit bond is a security of a doubtful nature. *Lushington v. Waller* 727

POUND—Tender of rent after distress.—It is no answer to an action on the statute 2 W. & M. c. 5, for a pound breach, that the rent and demand were tendered after the distress and impounding. *Firth v. Purvis* . . . 637

POWER. *See* Settlement (Marriage), 1, 2, 3; Vendor and Purchaser, 5.

PRACTICE—1. **Affidavit**.—Collusion not to be presumed against the affidavit of the plaintiff in interpleading bill; nor can counter affidavit prevail against it. *Langston v. Boylston* 174

— 2. **Cross damages**.—If A. recover against C. and C. recover against A. and B. the Court will permit C. on motion to set off the damages which he has recovered against those obtained by A. on his undertaking that the bill of A.'s attorney in the first action shall be satisfied, he having a lien on the judgment for his costs. *Mitchell v. Oldfield* 342

— 3. **Costs of suit in formâ pauperis**.—One of the defendants was admitted to sue in formâ pauperis. The decree ordered generally that the

costs of all parties should be taxed and paid out of the estate. The costs of the pauper defendant shall be taxed as *dives costs*. *Wallop v. Warburton*. 89

PRACTICE—4. Debt under 40s.—Stay of proceedings.—Proceedings in an action stayed, it being sworn by the defendant, and not denied by the plaintiff that the debt was under 40s. *Kennard v. Jones*, 447. *Wellington v. Arters* 544

— **5. Interrogatories.**—When a defendant is brought up on an attachment for a rescue it is the practice of the Court to put interrogatories to him, though he do not deny the charge in the affidavits, unless the prosecutor waive putting them. *R. v. Horsley* 619

PRINCIPAL AND AGENT—Sale to principal by agent on agent's own account.—An agent, who was to have no emolument beyond his salary, decreed to account for profit made by a clandestine sale to his principal on his own account. Timber purchased for a colliery: before it was applied to the use of the colliery some of the owners retired; and it was paid for by those only who remained; the former owners are not necessary parties to a suit by those, who remained, against the vendor on account of that sale.

Bill for account of profit made by breach of trust, and injunction to prevent recovery at law of another sum under the same circumstances: upon the answer coming in the injunction was dissolved, and the money paid under the action; not necessary to charge that fact by supplemental bill. *Massey v. Davies* 218

PROMISSORY NOTE.—A promissory note, payable on a contingency, cannot be declared on as a promissory note within the statute, 3 & 4 An. c. 9. *Carlos v. Fancourt* 647

And see Donatio mortis causa.

PUBLIC OFFICER—Indictment.—In an indictment against a public officer for a breach of duty, it is sufficient to state generally that he is such officer without shewing his appointment. Where a duty is thrown on a body, consisting of several persons, each is individually liable for a breach of duty: as well for acts of commission as for omission. In an indictment against a servant of the East India Company, for offences in India, it is sufficient to charge him with a wilful breach of duty, without adding that it was corrupt. In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force. Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them.—Time and place must be added to every material fact in an indictment.—A charge in an indictment against an officer for a breach of orders, in not prosecuting a war "with all possible vigour and decision," is too uncertain, even though the charge be made in the very words of the order given to him. *R. v. Holland* 678

QUO WARRANTO. *See Churchwarden; and Franchise.*

RECORDER—Election.—Mandamus granted to the Mayor, &c., of York, to put the corporate seal to the certificate of the election of the recorder, on an affidavit that he had the majority of legal votes; though it was stated that the other candidate had the majority at the election, and that the corporation had already certified his election. *R. v. The Mayor of York* 501

RECOVERY.—Though the deeds to make a tenant to the *præcipe* be not executed till after the execution of the writ of *seisin*, still recovery will be good by the 14 Geo. II. c. 20, if the deeds be executed in the term in which the recovery is suffered. *Goodright d. Burton v. Rigby* 564

RECTORY—Grant of rectory includes a perpetual curacy unless excepted.—Where the grant of a rectory by the Crown contained an exception of all churches and vicarages thereto belonging, a perpetual curacy belonging to the rectory passed by the grant, not being included in the exception. *Arthington v. The Bishop of Chester* 802

RENT. See Landlord and Tenant, 5, 6, 7.

RESPONDENTIA. See Will, 32.

RESTRAINT OF TRADE—Specified distance.—In consideration that A. would take B. as an assistant in his business as a surgeon, for so long a time as it should please A., B. agreed not to practise on his own account for fourteen years within ten miles of the place where A. lived, and gave a bond for this purpose: this bond was held good in law. *Davis v. Mason* 562

RIGHT OF WAY. See Trespass.

SAILOR. See Impressment.

SALE OF GOODS—1. Property in goods delivered to agent of insolvent vendee.—Goods are sold and delivered by the vendor to an agent acting under a general authority, on account of a vendee who is abroad. Previously to the sale, the principal had written to the agent, stating that he is ruined, and directing the agent to return any goods purchased on his account. This letter, which arrives after the delivery of the goods, is communicated by the agent to the vendor, who agrees to take back the goods. Held, that the property in the goods as between the vendor and creditors of the vendee who have attached the goods in the hands of a bailee to whom they have been delivered by the agent, is in the vendor. *Salte v. Field* 568

— 2. Smuggling Transaction.—A vendor of goods abroad having packed them up by order of the buyer in a particular manner, for smuggling them into this country, and knowing at the time that they were to be smuggled, cannot recover the value of them against the buyer, although he was not concerned in the risk of importing the goods in this country. *Waymell v. Reed* 675

— 3. Rescission of contract for sale of goods.—A contract of sale may be rescinded by the consent of the vendor and vendee before the rights of other persons are concerned. But where the vendee wished to return the goods, and the vendor instituted an attachment to attach the goods in the hand of a packer as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt, it was held that the vendor could not recover the goods from the packer in trover. *Smith v. Field* 630

— 4. Warranty of Horse.—Where a horse has been sold warranted sound, which, it can be clearly proved, was unsound at the time of sale, the seller is liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness. *Fielder v. Starkin* . . . 700

And see Partnership, 3; Auctioneer, 1; and Frauds (Statute of).

SALT-PANS.—Salt-pans, being fixtures erected by the owner of a salt-spring for the profitable enjoyment of the inheritance, go to the heir and not to the executor. *Lawton v. Salmon* 764

SETTLEMENT (MARRIAGE)—1. Appointment.—4,000*l.* settled on marriage in trust after the decease of the husband and wife to pay among all and every the child and children other than an eldest or only son at such times and in such proportions as he, or she, or the survivor, should appoint

by deed or will; for want of appointment, among such child and children, other than, &c., equally to be divided; if but one, to that one; payable at twenty-one or marriage, or as soon after, as the life interest should drop; the shares of any dying before payable in the 4,000*l.* or so much, as should not be appointed, to go to the survivors at the same time: There were four younger children: the marriage settlement of one recited, that she was entitled to 1,000*l.* part of this fund; one-fourth of it was appointed to another on his marriage; and to a third 1,000*l.* as her share of that portion; the fourth died above twenty-one, before his father, who survived his wife, and died without any farther appointment: held, that 3,000*l.* was well appointed; and that the remainder vested in all equally according to the direction for want of appointment. *Wilson v. Piggott* 246

SETTLEMENT (MARRIAGE)—2. Appointment.—By articles the wife's fortune and an equal sum advanced by the husband were agreed to be settled for the husband for their joint lives, and if he should die first, leaving issue by her, for her for life, after her decease as to the capital in such manner as he should appoint, in default of appointment to be divided equally among the issue at twenty-one with maintenance and survivorship; after marriage in pursuance of the articles an estate purchased with the fund was settled upon the husband for the joint lives of him and his wife, remainder to trustees to preserve, &c., remainder, in case of his death first without issue, to certain uses, remainder, in case of his death first leaving any child or children, to the wife for life, remainder to all the child or children in such shares as the husband should appoint; for want of appointment, equally in tail with cross remainders, remainder to the heirs of the husband. Children only are the objects; and an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power; and the doctrine of *cy pres* by giving the child an estate tail is not applicable: but the appointment is void for the excess only; and what is ill appointed goes as in default of appointment.

Testator under a power to appoint among children appointed to the husband of a daughter for life, and if she survived him, to her for life, and having advanced her in marriage, recited that as a reason for giving her a small share: this is not illusory.

Parties taking under a will executing a power of appointment dispute part of it; there being no fund but that to be appointed it is not a case of election.

Personal estate under marriage articles to be invested in land, or government, or other securities; the Court finding it in its original state considers it as personal; but part having been laid out in land, which was settled, and afterwards sold, and the produce invested in stock, till a proper purchase of land could be found to be settled to the same uses, that was considered as land. *Bristow v. Warde* 235

— **3. Appointment—Cy pres.**—Personal estate settled on marriage for the husband for life, then for the wife for life, then to and among all and every the children and grandchildren, or issue, in such shares, under such restrictions, at such times, and in such manner, as they or the survivor should appoint by deed or deeds or by will; by want of appointment to all and every the children and grandchildren, or issue, living at the decease of the survivor, equally, payable at twenty-one or marriage; if but one, to that one; provided that in case of no appointment the issue of any children dead should not have a greater share than their parents would have had: issue only are within the power; but in any degree: but an appointment to any issue not living must be restrained to twenty-one years after lives in being at the creation of the power; otherwise it is void, even as to such as come *in esse* within those limits: but on marriage of a daughter interests may be given to her children, generally, and to the husband. What is ill appointed goes as in default of appointment: but children of a living parent cannot take under the proviso.

The doctrine of *cy pres* does not apply to personal estate; therefore where under a power to appoint personal estate to children or issue an appointment is made to a son for life, then among all his children, if none, to him his executors, &c., the limitation to his children being void, because not restrained within the legal bounds, cannot be made good *cy pres*.

Preceding limitations under an appointment being void, subsequent limitations, though within the power cannot be accelerated: and are void also; though the objects of the prior limitations never come *in esse*.

An unborn child of a person *in esse* may be made tenant for life, if beyond that the absolute interest is disposed of. *Routledge v. Dorril* . 250

SETTLEMENT (MARRIAGE)—4. Construction.—The limitations in a deed were to trustees to the use of A. and B. for their lives, remainder to the use of the child or children of B. in tail as tenants in common; “and in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be and remain to the use of the surviving child or children of B., and the heirs of his, her, or their bodies issuing, and in case all the said children should die without issue,” &c., then to A. in fee; held that the deed created cross remainders between the children of B.; and that on the death of one without issue, his share vested in a surviving child and the heir of one deceased, as tenants in common. *Doe d. Watts v. Wainwright* 634

— 5. **Dividends.**—Settlement on marriage of stock belonging to the wife in trust after death of the wife, if the husband survived, for him for life, if no issue, the whole to revert in the wife with power of appointment, if none, to her next of kin; the wife eloped and lived in adultery; on the bill of the husband to have the dividends paid to him during their joint lives, evidence of such intent, or that they should be to the separate use of the wife, refused: but held to belong to the husband for the mutual support of both; decreed, that the costs and also the expenses of the husband in a groundless suit instituted against him by the wife in the Ecclesiastical Court should be paid out of the accumulation, and, the only surviving trustee appearing not to be indifferent, that the future dividends should be paid into Court. *Ball v. Montgomery* 197

— 6. **Vesting of remainder—Power of revocation.**—By a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, &c., as the husband and wife should appoint; and for want of such appointment, to the use of all and every the child or children, equally, if more than one, as tenants in common; and if but one, then to such only child, his or her heirs or assigns for ever; remainder over; it was held, that the remainder to the children was a vested remainder in fee in each child when born, liable, however, to be divested by an appointment by the parents; and consequently (no appointment having been made) that the remainder to the children became absolutely vested. When the settlement contained a power for the tenants for life to revoke the uses, and for the trustees to sell and convey to the purchaser, “so that the purchase-money should be paid into the hands of the trustees to be laid out by them in the purchase of other estates to the same uses:” a purchaser to whom the legal estate was conveyed in due form, but without the purchase-money having been in fact paid to the trustees, or duly re-invested, did not acquire a good title against the persons entitled under the original uses. *Doe d. Willis v. Martin* 324

SETTLEMENT—Construction.—A., a grandfather, after the marriage of his son B., who had two children then living, by deed conveyed lands to trustees to the use of himself for life, remainder to B. for life; remainder to trustees, &c., remainder to the use of such child or children of B., and in such shares, &c., as B. should appoint, and in default of such appointment, “to the use of all and every the children of B., and the heirs of their several

and respective bodies as tenants in common, but if only one such child the use of such only child and the heirs of his or her body;" remained the right heirs of A. in fee. Then A. conveyed the reversion in fee to C. Afterwards B. had other children, and died without appointing. So that B.'s children took vested interests as tenant in tail, and that on the death of each child without issue, his share fell into the reversion conveyed to C.—Cross remainders cannot be implied in the construction of a deed. *Doe d. Tanner v. Dorvell*

SHERIFF—1. **Damages.**—In an action against the sheriff for taking insufficient pledges in replevin, the plaintiff cannot recover damages beyond the value of the distress. *Yea v. Lethbridge*

— 2. **Poundage.**—If a sheriff levy under a *fi. fa.* he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods. If after such a compromise either party rule the sheriff to return the writ, the Court will discharge that rule with costs, to be paid by the party obtaining it. *Alchin v. Wells*

SHIP—1. **Goods landed on wharf contrary to owner's direction.**—When the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, the owner upon demand and denial may maintain trover against the captain, unless the latter can establish the wharfinger's rights. *Syeds v. Hay*

— 2. **Position of mortgagee.**—A mortgagee of a ship who takes possession after the voyage has been completed and the cargo delivered has no claim upon the freight; nor is he liable for necessaries supplied to the ship for that voyage. *Chinnery v. Blackburne*

— 3. **Seizure.**—If a ship be seized as forfeited under the Navigation Act, 12 Car. II. c. 18, by a governor of a foreign country belonging to Great Britain, the owner cannot maintain trespass against the party seizing, although the latter do not proceed to condemnation; for by the forfeiture the property is devoted out of the owner. *Wilkins v. Despard*

And see **Insurance (Marine).**

SIMONY. See **Landlord and Tenant**, 9.

SLANDER—Solicitor.—In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney by his admission, or by a copy of the roll of attorneys; proof that he acted as such is sufficient. *Berryman v. Wise*

SMUGGLING TRANSACTION. See **Sale of Goods**, 2.

SOLICITOR—1. **Privileged communications.**—An attorney is not restrained by any rule of law from giving evidence of a conversation between him and his client touching the justice of his suit after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for conducting his cause. *Cobden v. Kendrick*

— 2. If any matter be disclosed to an attorney in the cause, he cannot be permitted to give it in evidence, either in that or any other action. It is the privilege of the client and not of the attorney: but such privilege is confined to counsel, solicitors and attorneys, when acting in their respective characters. *Wilson v. Rastall*

— 3. **Attorney examined as a witness must disclose acts done in his presence by his client, as execution of a deed, &c.; not private confidential**

conversation with him, as the reasons for making it, &c., on motion to suppress the depositions referred to see, what part came to his knowledge as confidential attorney; in order to have that suppressed. *Sandford v. Remington* 195

And see **Landlord and Tenant**, 1; **Practice**; and **Slander**.

SPECIFIC PERFORMANCE. See **Vendor and Purchaser**, 4, 5; and **Frauds**, Statute of, 2.

SUNDAY—Service of notice.—Service of notice of declaration on a Sunday, is bad, though the defendant accept it, knowing it to be irregular. *Morgan v. Johnson* 809

SUNDAY TRADING.—The statute 29 Car. II. c. 7, does not prohibit a baker baking dinners for his customers on a Sunday. *R. v. Younger* . . . 638

SURETY—1. A. being indebted to B. lodges several securities for money with him, as collateral securities for that debt. A. afterwards borrows a further sum of money of B. for which C. becomes his surety. A. becomes bankrupt, and B. calls upon C. to pay the second debt. The securities in the hands of B. being more than sufficient to pay the first debt, C. shall have the benefit of the surplus in reduction of the second debt. *Præd v. Gardiner* 8

— 2. Rights of against principal's estate. *Rigby v. Macnamara* 92

And see **Bond**.

SURGEON—Covenant by, not to practise. See **Restraint of Trade**.

SURVIVORS—Limitations to. See **Settlement (Marriage)**, 4.

TENANT FOR LIFE—Underwood.—Tenant for life has no property in the underwood, till his estate comes into possession: therefore cannot have an account of what was cut wrongfully by a preceding tenant.

Tenant for life without impeachment of waste cannot maintain trover for timber severed during a prior estate; but it rests immediately in the owner of the inheritance. Tenant for life impeachable is in the same case as to underwood. Costs given. *Pigot v. Bullock* 148

TENANT IN TAIL—1. Charge.—Tenant in tail restrained as to alienation, but with powers of leasing and jointuring as in case of tenant for life, considered as tenant for life, and therefore his personal representative a creditor for a charge on the estate paid by him (intent to the contrary not appearing) though the subsequent remainders were exactly of the same nature, and, the term having been very short, little more than forty years remained. *Countess of Shrewsbury v. Earl of Shrewsbury* 101

— 2. If a tenant in tail by purchase under a settlement made by his ancestor *ex parte maternâ* suffer a recovery, and declare the uses to himself in fee, he takes the fee as a purchaser, descendible to his paternal heirs. If tenant in tail by descent from maternal ancestor suffer a recovery, and declare the uses to himself in fee, the estate will descend to the heirs *ex parte maternâ*; whether it be copyhold or freehold. *Roe d. Crow v. Baldwre* 550

TENANTS IN COMMON. See **Vendor and Purchaser**, 5.

THEATRE—Contract to dance at unlicensed place.—Having regard to the provisions of 10 Geo. II. c. 28, s. 2, and 25 Geo. II. c. 36, ss. 2, 3, no action can be maintained for the breach of an agreement "to dance at the King's Theatre in the Hay-Market, or at such other place as the plaintiff should appoint," if it appear that no licence for that theatre was granted by

the Lord Chamberlain, as required by the 10 Geo. II. c. 28; and that the plaintiff did not request the defendant to dance at any other place which was licensed. *Gallini v. Laborie* 58

TIMBER—Power to cut. See Lunatic, 1; and Tenant for Life.

TITHE—Exemption—evidence.—In debt on 2 & 3 Ed. VI. c. 13, for not setting out tithes, where the declaration stated that they were within forty years next before the statute of right yielded and payable, and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe is not sufficient to defeat the action. *Mitchell v. Walker* 58

TOLL—Place of collection.—Where by a navigation-act the proprietor was entitled to a toll of 4s. per ton for goods carried from A. to B. or from B. to A. and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection, it was held, that the tolls for goods carried the whole voyage from A. to B. are rateable in B. though in fact they are collected in a parish between A. and B.; because the tolls become due where the voyage is completed. *R. v. Page* 454

TORT.—Where the ground of action is a pure tort, the defendant cannot set up (by plea in abatement or otherwise), that others were joint wrongdoers. *Mitchell v. Tarbutt* 684

TRADE, IMPLEMENTS OF. See Landlord and Tenant, 6.

TRESPASS—1. Right of way.—If to an action of trespass for pulling down and carrying away a gate, the defendant plead a right of way, and that the gate being wrongfully erected across the same, he took it down and deposited it in a convenient place for the use of the plaintiff, to which the plaintiff replies a subsequent conversion; proof that the defendant put the gate upon his own premises, from whence the plaintiff might have taken it, if he had pleased, will not sustain the replication. *Houghton v. Butler* 411

— 2. Trespass will not lie in this country for entering a house in Canada. *Doulson v. Matthews* 448

And see Common, 2.

TRIAL, NOTICE OF.—Although the plaintiff has undertaken peremptorily to proceed to trial at the next Assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, &c., without having had notice of trial. Neither will the prothonotary allow him the costs of such attendance and preparation, though he obtain judgment as in case of a nonsuit on account of the plaintiff's not proceeding to trial. *Ifield v. Weeks* 754

TRUST. See Will.

TRUSTEE—1. For sale, must not purchase for himself.—A trustee for the sale of estates for payment of debts, who purchased them himself, by taking undue advantage of the confidence reposed in him by the plaintiff, and previous to the completion of the contract, sold them at a highly advanced price; decreed to be a trustee for the original vendor as to the sums produced by such second sale. *Fox v. Mackreth* 55

— 2. Costs.—Costs refused to a trustee, setting up a trust different from what it really was: but general misconduct, &c., is not a sufficient ground. *Bull v. Montgomery* 197

UMPIRE. See Arbitration.

VENDOR AND PURCHASER.—1. Copyhold.—Fines.—A manor was sold under the decree of the Court as part of the real estate of the testator; and an order was made on the 13th March that the purchaser should, on or before the 17th day of May, pay his purchase-money into Court, and be let into possession of the profits from Lady-day. Several deaths had taken place prior to Lady-day, but the admissions and fines due thereon had been postponed until after that time, no Court having been holden. These fines belong to the vendors and not to the purchaser. *Garrick v. Earl Camden*. 37

— 2. Notice of leases.—Purchaser with notice is bound in all respects as the vendor; therefore where tenant for life granted leases for lives under a power, and bound himself upon the dropping of a life to grant a new lease with the same provision for renewal on the death of any person to be named in any future lease, and afterwards joined in a sale, though the power is exceeded, yet if a life drops in the life of the lessor, the purchaser having notice must specifically perform by granting a new lease with the same provision. General notice to a purchaser, that there are leases, is notice of all their contents. *Taylor v. Stibbert*. 278

— 3. Purchase-money.—Payment into Court.—In a suit for the payment of creditors the real estates of the testator were ordered to be sold. A. being reported the purchaser of one of the estates for 14,480*l.* entered into possession and accepted the title, and proper conveyances were executed. On application by the creditors to have the purchase-money paid out, the purchaser stated that the tenants of the estate had been served with a writ of right at the suit of a person who claimed the whole estate under an adverse title. But the Court thought that the purchaser having accepted the title, &c., could not now prevent the money being paid out of Court, and ordered accordingly. *Thomas v. Powell*. 86

— 4. Specific Performance.—Where a written agreement is entered into for the purchase of an estate at a price far beyond its value, but without any circumstances of fraud or surprise, the Court will not decree a specific performance of such a contract, but on the other hand will not rescind it. *Day v. Neuman*. 1

— 5. Specific Performance.—Partition of an estate in common a good execution of a power to sell or exchange.

The estate of a tenant in common cannot be so settled on marriage of one as to prevent the right of the others to make partition. *Abel v. Heathcote*. 171

And see Settlement (Marriage), 6.

VESTRY CLERK.—A mandamus to admit a vestry clerk refused. *R. v. The Churchwardens of Croydon*. 688

VISITOR. See College.

WAGER.—A wager is illegal when made respecting a subject prohibited by statute. *Johnson v. Bann*. 309

WARD.—The Court of Chancery will under circumstances of improper conduct interfere to prevent a father from interfering in the education, &c. of his son, being a ward of the Court. *Creuze v. Hunter*. 38

WARRANTY, of Horse. See Sale of Goods, 4.

WASTE.—The words "waste" and "destruction" in the Statute of Lunatics are to be construed in the ordinary, not the technical sense. *Oxenden v. Lord Compton*. 131

Ex parte Bromfield. 126

WILL—1. **Appointment.**—Devise of personal estate for life, then among all children of devisee in such shares and manner, for such interests, with such survivorship, and to vest at such time, as devisee for life should by deed or will appoint: in default of appointment of the whole or part, equally, if but one, to that one, payable at twenty-one; nevertheless the shares of any attaining twenty-one in life of devisee for life to be vested; but payment to be postponed till her death: that clause, vesting an interest at twenty-one, held to relate only to the case of default of appointment; and one of two children being dead without issue after twenty-one, and without receiving any share, that circumstance will not prevent an appointment of the whole fund to the survivor. *Boyle v. Bishop of Peterborough*. . . 108

— 2. **Bequest of debt.**—A bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, or whether the sum be expressed in the bequest or the debt bequeathed generally. *Stanley v. Potter* . . . 26

— 3. **Construction.**—Bequest of stocks to trustees in trust after the death of A. to transfer the same to and amongst all and every the nephews and nieces that should be then living, "to wit, the said J. B. or her children, and the said P. B. or his children, and D. L. or his children, and P. L. or his children, and S. E. or her children." Under this bequest a nephew not expressly named is not entitled to any share. And the fund is equally divisible amongst such nephews and nieces and their children as were living at the time of the death of A. *Eccard v. Brooke* . . . 31

— 4. **Interest of residue of personal estate, given by will to a woman for life, then the residue to her nieces, if they die without issue, over: the last limitation over is too remote; and on death of the aunt the nieces take the whole.** *Everest v. Gell* . . . 107

— 5. **Under a devise to A. and his heirs, but if he die without settling or disposing of the same, or without issue, then over, A. may settle the estate in his lifetime, and defeat the limitation over.** *Beachcroft v. Broome* . . 427

— 6. **A. devised to B. and the heirs of her body and for default of such issue, then over; B. died in the lifetime of A. and then A. by a codicil confirmed his will; held, that the heir of B. took nothing, though it appeared that A. knew of the death of B. and of the birth of her son, before he made the codicil.** *Doe d. Turner v. Kett*. . . 475

— 7. **Under a devise "to A. and B. and their heirs, and in case they agreed to sell the estate, that they should have their equal shares of the money arising therefrom; but if they agreed to keep the estate whole together, then that the rents should be equally paid and divided between them, and to the several and respective heirs of their bodies." A. and B. took only estates tail.** *Roe d. James v. Avis* . . . 477

— 8. **A. bequeathed money to trustees in trust for B. till she should attain twenty-one, and then to pay the same to her; and if B. should die under twenty-one, leaving a child or children, then in trust for such child or children; but if B. should die under twenty-one without leaving any child or children, then in trust for C.'s three nieces. B. attained twenty-one, married, had two children, and died in the life of the testatrix: B.'s children took nothing by the will.** *Doe v. Brabant* . . . 503

— 9. **A. devised "to all and every the daughter and daughters of the body of B. and the heirs male of the body of such daughter or daughters, equally between them; if more than one, as tenants in common: and for default of such issue, he devised all his said lands to C.;" held that the daughters of B. took cross-remainders.** *Atherton v. Pye* . . . 509

— 10. **By a devise to A. for life without impeachment of waste, and after his decease to the issue male of his body and to the heirs and assigns of such issue male for ever, and for default of such issue male to B., &c.;**

A. takes an estate tail. But supposing he only took for life, yet as the remainder of his issue and the subsequent remainders are contingent, they may be barred by a recovery suffered by A. before any issue born. *Denn d. Webb v. Puckry* 601

WILL—11. A. devised his estates real and personal "in trust to trustees for his brother B. and his first and every other son in tail male; failure of such issue to his brother C. and his first and every other son in tail male, &c., &c.; in all the foregoing cases without impeachment of waste, other than wilful;" and directed the renewals of a leasehold estate to be made "by the tenant for life;" held that B. took only a life estate, with remainder in tail to his children. *Doe d. Phipps v. Lord Mulgrave* 607

— 12. A. devised to his nephew B., but if he died without male heir, then to another nephew C. and his heirs; and charged the estate with an annuity to D. and several legacies to other persons, to be paid at a future time; held that B. took an estate tail. *Denn d. Slater v. Slater* 616

— 13. A. by will gave two legacies of 150*l.* each to his son and daughter to be paid at twenty-one; then he gave all his realty and personalty to his wife for life; and after her death one freehold estate to the son and another to the daughter; "but if either or both of his children should die before the wife, then those legacies which were left to them should return to the wife;" held that on the death of the son before the mother, the mother was entitled to the reversion of the freehold estate. The word "legacy" may be applied to a real estate, if the context of the will shew that such was the testator's intention. *Hardacre v. Nash* 691

— 14. A devise of "all the rest and residue of my estate of what nature or kind soever," includes real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied to personal property alone. *Doe d. Burkitt v. Chapman* 755

— 15. Devise to wife for life.—Testator devised a freehold estate to his wife for her life, and then directed that she should dispose of the same amongst the testator's children by her at her decease, as she should think proper.

The wife made no disposition of the estate.

The children take no interest in the estate under the will. *Crossling v. Crossling* 88

— 16. Direction to invest money in land.—Testator directed money to be laid out in manors, lands, tenements, tithes, and hereditaments, or very long terms, with limitations, applicable to real estate: the money not having been laid out, the Crown on failure of heirs has no equity against next of kin to have it laid out in real estate, in order to claim by escheat: the devisees on becoming absolutely entitled have the option given by the will; and a deed of appointment by one, a *feme covert* was held sufficient indication of her intention, that it should continue personal property, against her heir, claiming it as ineffectually disposed of for want of her examination.

Trustee, not having the legal estate, cannot hold against the Crown, claiming by escheat.

Copyhold cannot escheat to the Crown.

The rule, that money, directed to be laid out in land, shall be considered as land, holds only, where the quality of the land is imperatively fixed on the money. *Walker v. Denne* 185

— 17. Election.—Election to take under or in opposition to a will can only be compelled upon something in the will, not *dehors*. *Stratton v. Best* 106

— 18. Election.—Testator appoints to grand-children under a power to appoint to children a fund, to go in default of appointment equally: the appointment being bad, the children, having legacies, must elect. *Whistler v. Webster* 260

WILL—19. Estate-tail.—Under a devise to “A. for life and after his decease to and amongst his issue, and in default of issue,” then over, A. takes an estate-tail. In order to give an effect to the deviser’s general intent, a Court will overlook a particular intent inconsistent therewith. *Doe d. Blandford v. Applin* 337

— 20. **Issue.**—Issue is either a word of purchase or limitation as will best effectuate the deviser’s intention. Therefore where A. devised his estate to his two daughters to be equally divided between them, one moiety to one and her heirs, and the other moiety to the other for life, and after her decease to the issue of her body and her heirs for ever, and she had one child living at the time of the demise, the second took only an estate for life, with remainders to her children, as purchasers. *Doe d. Cooper v. Collis* . . . 388

— 21. **Legacy.**—J. T. bequeathed in these words, “I give to N. D. the sum of 400*l.* which he owes me on mortgage of his estates in Shropshire, and I further order my executor to give him up all bonds owing from him to me, and which shall be found in my custody at my decease, with all interest due thereon.” N. D. had given the testator a bond as a collateral security for the mortgage money. N. D. died before the testator. This is a lapsed legacy, and the executor of N. D. must pay the money. *Toplis v. Baker* 21

— 22. **Gift by will to the children of a deceased sister, is a gift to those who were living at the death of the testator.** *Viner v. Francis* . . . 29

— 23. The testator gave to A. B.’s children “50*l.* to every child he hath by his wife, to be paid them as they shall come of age.” There were eleven children at the date of the will; thirteen at the testator’s death, and three born afterwards. The thirteen children living at the death of the testator, are entitled to their legacies, but not those born afterwards. *Ringrose v. Bramham* 84

— 24. **Legacy out of a fund in the East Indies, given over in case of death of legatee before he might have received it, vested from death of testator.**

Interest of legacies to be computed from a year after testator’s death; unless some other time appointed by testator: but he cannot make executor answer interest beyond what the law has done.

Estate devised on trust to be sold with all possible diligence or in reasonable time, considered as sold from testator’s death. *Hutcheon v. Mannington* 115

— 25. **Legacies nearly similar given to the same persons by different instruments: legatees not entitled to both.**

Legacies to the same persons by different instruments generally presumed additional, unless contrary intent appears; of which simple repetition if exact is sufficient proof.

Legacies by one instrument not adeemed by a second, not relating to the first. *Moggridge v. Thackwell* 140

— 26. This clause beginning a will, “First I will and direct, that all my legal debts legacies and funeral expenses shall be fully paid” is not sufficient alone to charge legacies on real estates specifically devised; for which the intent must be clear. *Kightley v. Kightley* 224

— 27. **Limitation.**—In this case an absolute term of 99 years limited to J. C. amongst other limitations of a real estate under a will, was, with reference “to the true construction of the several parts of the will,” considered not as an absolute term, but as determinable on the death of J. C. *Coryton v. Helyar* 75

— 28. A. devised to his son B. for life; remainder to trustees during B.’s life, to preserve contingent remainders; nevertheless to permit B. to receive the rents and profits, remainder to the first and other sons of B. in

to C.; with a proviso that the limitation of A.'s estate to B. should cease, and the remainder should take as if B. were dead; B. succeeded to D.'s estate. He had a son; held that the limitation to the trustees continued during the whole of B.'s life so as to support the contingent remainders. *Doe d. Hen. v. Heneage* 311

WILL—29. Married woman—Power.—B., a married woman, made a will, merely executing a power given her by the marriage settlement, but she appointed C. executrix generally. The Ecclesiastical Court granted probate of this will in the general form. B. was the sole executrix of her late husband A. The general probate of the will of B. will transmit to C. the representation of A. without an administration *de bonis non*. *Barr v. Carter* 98

— 30. Meeting-house.—A. devised to B. preacher of the meeting-house of C. for life, on condition that he should convey the premises to trustees to take place after B.'s death for the use and support of the preaching the word of God at the meeting-house for ever; and in case the preaching there should be discontinued, then over to a charity school; held that B. took an estate for life, though the devise over, after his death, would be void by the statute of mortmain, 9 Geo. II. c. 36.; *Doe d. Phillips v. Aldridge* 379

— 31. Mortmain.—Testator gave real and personal estate in trust that a commodious and proper house should be taken on lease at such yearly rent, as should be agreed on, or otherwise, as the trustees should think fit, as a school; and that the children and grand-children of some relations should be placed there from the age of seven to fourteen, then to be put out apprentices; also that such other children, as the trustees should think fit, should be placed at the same school; and he gave directions as to an inscription, visitation, &c.: this trust is void under the mortmain act as to the general purpose of a permanent charity, but good as to the disposition for the relations to the extent of children and grand-children of such of the stocks specified as were in being at the testator's death; and while the school is kept open for them, other children may be educated there. *Blandford v. Thackerell* 202

— 32. Payment by executors of money due under illegal contract.—The testator having borrowed money on a *respondentia* contract prohibited by the laws of this country, his executors the plaintiffs refunded the money to the lenders, the defendants; the Court held, that the executors could not maintain an action for money had and received to recover back this money, notwithstanding the defendants could not have compelled them to pay it. *Munt v. Stokes* 459

— 33. Payment of debts.—Devise of land to be sold: money, produced by the sale, charged with simple-contract debts.

Where testator combines real estate with personal generally, the real is subject to all the burthens of the personal. *Kidney v. Cousemaker* . . 118

— 34. Republication.—Republication of a will implied from a codicil referring to the will.

The particular intent to republish need not appear.

The Court will not execute a will partially. *Barnes v. Crowe* . . . 154

— 35. Residue.—Executor is entitled to an unbequeathed residue, unless there is a strong and violent presumption against him: a legacy to him affords such presumption: but parol evidence of the intention is admissible to rebut that; and is not to be confined to the time of making the will: but it must be to shew the intention at that time only. Residue unbequeathed decreed to the executor, who was a legatee, upon the intention appearing in the will and by parol evidence.

WILL—19. *Estate*—*Can* be distributed *ante* *life* and after his decease to *any* *our* legacies, is not warranted. *Clennell v. ...*, A. takes an *...*
 tent, *...*—36. **Revocation**.—Marriage and the birth of a posthumous child amount to an implied revocation of a will of lands made before marriage. *Doe d. Lancashire v. Lancashire* 535

— 37. **Trust**.—Trust raised under a recommendation by will to a legatee to dispose of her legacy among certain persons after her death.

Testator by shewing his desire creates a trust, unless plain words or necessary implication, that there is to be a discretion to defeat it. *Malim v. Keighley* 229

And see Vendor and Purchaser, 3.

WITNESS—Expenses.—The Court will not grant an attachment against a witness for not obeying a subpoena to attend at a trial, unless the whole expenses of the journey and of the necessary stay at the place of trial, be tendered at time of serving the subpoena. *Fuller v. Prentice* . . . 715

And see Practice, 4, 5; and Evidence, 2.

WRIT. *See Attachment and Execution.*

END OF VOL. II.

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